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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1403~~ 992

THE UNITED STATES EX REL: FRANK ROSE,
PLAINTIFF IN ERROR,

vs.

JOHN C. BLACK, COMMISSIONER OF PENSIONS.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 2, 1888.

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1 *Petition for Mandamus. Filed Jan.* 13, 1888.

In the Supreme Court of the District of Columbia, the — day of Jan'y, 1888.

THE UNITED STATES *ex relatione* FRANK ROSE
vs.
JOHN C. BLACK, Commissioner of Pensions. } Law, No. 28377.

To the honorable the chief justice and the justices of the supreme court of the District of Columbia:

The petition of your relator, Frank Rose, respectfully represents—

1. That he is a citizen of the United States and of the State of New Hampshire, and resides in the town of Hooksett, in the county of Merrimack, in said State. He brings this suit in the name of the United States for and in his own behalf for the writ of mandamus against the respondent.

2. That the respondent, John C. Black, is also a citizen of the United States and of the State of Illinois; is the Commissioner of Pensions, and as such is sued.

3. And your relator alleges that during the late civil war he was in the military service of the United States, and served in "D" Company, 57th New York Volunteer Infantry; that in battle he received such wounds as resulted at the time thereof in the amputation of his left arm at the shoulder and right leg at the thigh; that the Pension Office, under the administration of one of respondent's predecessors, has so found and adjudged the facts to be, but instead of granting him a pension therefor in the first class at $25 per month from June 6, 1866, under the equivalent clause, so called, of section 4697, Revised Statutes of the United States; at $31.25 per month from June 4, 1872, under the equivalent clause, so called, of section 4698, Revised Statutes of the United States; at $50 per month from June 4, 1874, under the equivalent clause, so called, of the act of Congress of June 18, 1874, and at $72 per month from June 17, 1878, under the operation of the act of Congress of June 16, 1880, as so totally and permanently disabled as to be rendered utterly helpless, or so nearly so as to require regular aid and attendance of another person within the meaning of the law, granted unto him a pension, by certificate No. 39330, as for the loss merely of one hand and one foot, and accordingly rated him at $20 per month from March 3, 1865, under said section 4697; at $24 per month from June 4, 1872, under said section 4698, and at $36 per month from February 28, 1877, under the provisions of the act of that date, construed with the provisions of said section 4698, providing a pension for the loss of a hand or foot of $18 per month; and your relator says that the respondent has refused and still refuses to reissue your relator's said certificate with the increased rate at $48 per month from March 3, 1883, and at $60 per month from August 4, 1886, for the loss of his left arm at the shoulder and right leg at the thigh, considered as involving the loss merely of one hand and one foot. The

direct purpose of this suit is to coerce the respondent, as Commissioner of Pensions, by mandamus to so reissue your relator's said pension certificate.

4. And your relator says that he has been finally adjudged by the predecessors of the respondent in office to have sustained, while in the military service of the United States and in the line of duty, such wounds as resulted at the time thereof in the loss of his left hand and right foot, as necessarily merged or included in the amputation of his left arm at the shoulder and right leg at the thigh, and that such adjudication has been ratified and confirmed by the honorable Secretary of the Department of the Interior, as evidenced by your relator's said pension certificate, signed by the then Secretary and countersigned by the then Commissioner of Pensions and sealed with the departmental seal, which said certificate your relator prays to read and exhibit to the court at the hearing of this petition.

5. And your relator further says that from June 4, 1872, the loss of one hand or one foot is pensioned at $18 per month by the following provisions of said section 4698, namely: "And all persons who, under like circumstances, shall have lost one hand or one foot, or been totally and permanently disabled in the same, or otherwise so disabled as to render their incapacity to perform manual labor equivalent to the loss of a hand or foot, shall be entitled to a pension of eighteen dollars per month."

6. And your relator says while this provision of the law was in force granting a pension of $18 per month for the loss of either the hand or foot Congress passed the act of February 28, 1877, as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons who, while in the military or naval service of the United States and in the line of duty, shall have lost one hand and one foot, or been totally and permanently disabled in both, shall be entitled to a pension for each of such disabilities, and at such a rate as is provided for by the provisions of the existing laws for each disability: Provided, That this act shall not be so construed as to reduce pensions in any case.

"Approved February 28, 1877."

7. And your relator says that from and after the passage of the said act of February 28, 1877, he became entitled, for the loss of his left arm at the shoulder and right leg at the thigh, considered as involving the loss merely of the left hand and right foot, to a pension of $18 per month for the loss of his hand and to a like pension of $18 per month for the loss of his foot, and to a pension of $36 per month for the combined loss of the hand and foot. He admits that he was so pensioned by respondent's predecessors in office.

8. But your relator alleges that the said provision of said section 4698, Revised Statutes of the United States, granting a pension of $18 per month for the loss of either hand or foot, is superseded by the act of Congress of March 3, 1883, which, among other things, provides—

"That from and after the passage of this act all persons on the

pension roll and all persons hereafter granted a pension who, while in the military or naval service of the United States and in the line of duty, shall have lost one hand or one foot, or been totally and permanently disabled in the same, or otherwise so disabled as to render their incapacity to perform manual labor equivalent to the loss of a hand or a foot, shall receive a pension of twenty-four dollars per month."

And your relator alleges that thereafter he became and now is entitled to a pension of $24 per month for the loss of his left arm at the shoulder (considered as involving the loss merely of the left hand) and to a like pension of $24 per month for the loss of his right leg at the thign (considered as involving the loss merely of the right foot), and to a pension of $48 per month for the combined loss; and that the duty of the respondent to accordingly reissue your relator's said certificate is imposed upon him as Commissioner of Pensions by law, suffering and permitting the respondent to exercise no discretion at all in the premises; yet, as your relator avers, the respondent has refused and still refuses to so reissue your relator's said certificate or to discharge his plain duty as Commissioner of Pensions, as required by said laws, though often requested by your relator so to do.

9. And your relator further alleges that the said provision of the said act of March 3, 1883, is superseded by the act of Congress of August 4, 1886, which, among other things, provides—

"That from and after the passage of this act all persons on the pension rolls and all persons hereafter granted a pension who, while in the military or naval service of the United States and in line of duty, shall have lost one hand or one foot, or been totally disabled in the same, shall receive a pension of thirty dollars a month."

And your relator avers that from thence he was and still is entitled to a pension of $30 per month for the loss of his left arm at the shoulder (considered as involving the loss merely of the left hand) and to a like pension of $30 per month for the loss of his right leg at the thigh (considered as involving the loss merely of the right foot), and to a pension of $60 per month for the combined loss; and he alleges that it is the plain legal duty of the respondent, as Commissioner of Pensions, to reissue your relator's said pension certificate with the increased rate as aforesaid; that the law imposes this duty upon him, and that the respondent has no choice nor discretion at all in the premises; yet, as your relator avers, the respondent has refused and still refuses to so reissue your relator's said certificate or to discharge his plain, simple, ministerial duty in the premises, although often requested by your relator so to do.

10. And your relator further says that the said provisions of said section 4698, the said provision of the said act of March 3, 1883, the said provision of the said act of August 4, 1886, and the said act of February 28, 1877, are laws *in pari materia*. They relate to the same subject-matter, and together form a system or code of laws fixing the rate of pension, from time to time, since the said 28th day of February, 1877, that your relator is entitled to for the loss
3 of his left arm at the shoulder and right leg at the thigh, con-

sidered as involving or merging the loss merely of the hand and foot; that they are coexisting laws for the respective periods thereby covered, and, construed together, grant unto your relator for his said greater disability, considered as necessarily merging the lesser that is particularly specified in the law, to wit, the loss of one hand and one foot, a pension of $48 per month from March 3, 1883, and $60 per month from August 4, 1886; but he says that the respondent, as Commissioner of Pensions, has refused and still refuses to accordingly reissue your relator's said certificate with the increased rating aforesaid, and has denied your relator's petition demanding, as his legal right, the reissue of his said certificate with the increased rate to $48 per month from March 3, 1883, and $60 per month from August 4, 1886; hence your relator files this his petition for the writ of mandamus against the respondent.

11. But your relator further says that in the loss of his left arm at the shoulder and right leg at the thigh he has sustained a greater disability than is particularly specified in the law, to wit, the loss merely of one hand and one foot, to entitle him to the rating of his pension as aforesaid, and he avers that his disability is in all respects equivalent to, if not greater than, the loss merely of both hands or both feet, and that upon a just and impartial administration of the pension laws and upon their proper and rightful interpretation he is entitled to be rated therewith, in the first class, at $25 per month, from June 6, 1866, under the following provision of said section 4697, namely: "Or who shall have been otherwise so totally and permanently disabled as to render them utterly helpless, or so nearly so as to require regular personal aid and attendance of another person, shall be entitled to a pension of twenty-five dollars per month;" at $31.25 per month from June 4, 1872, under the like provision of said section 4698; at $50 per month from June 4, 1874, under the following provision of the act of June 18, 1874, namely: "Or by any other injury resulting in total and permanent helplessness, shall be entitled to a pension of fifty dollars per month;" and at $72 per month from June 17, 1878, by operation of the act of June 16, 1880; and your relator avers that said provisions of sections 4697 and 4698 and of the act of June 18, 1874, require in no case a greater degree of helplessness than results from the loss of both hands or both feet or from their total and permanent disability to entitle a like rating therewith in the first class at the rates aforesaid, and he says that his disability from the loss of the left arm at the shoulder and right leg at the thigh, though necessarily involving the lesser disability of the loss of one hand and one foot, is at least of equal degree of the loss of both hands or both feet or the total and permanent disability of the same, and he was at the time and is now entitled to a like pension therewith; but your relator says that he has never been adjudged by the respondent nor by either of his predecessors in office to now be, and to have continuously been since discharge, so totally and permanently disabled from the said loss of his left arm at the shoulder and right leg at the thigh as to be rendered utterly helpless, or so nearly so as to require regular aid and attendance of another person within the meaning of the law, and he is therefore

advised by his counsel that a mandamus will not lie to coerce the respondent to reissue his said pension certificate with the ratings aforesaid; that however manifest it may appear to a fair and reasonable mind that your relator's utterly helpless condition entitles him to such an adjudication at the hands of the respondent, as Commissioner of Pensions, and to such classification of his pension, the ascertaining of the facts of such degree of helpnessness involves the exercise of judgment and discretion—some little judgment and discretion—and belongs to that class of administrative duties known as *quasi* judicial, the performance of which in any particular manner or to accomplish a particular result cannot be controlled nor directed by the writ of mandamus; your relator does not, therefore, apply to your honors for any such coercive measures in that behalf.

12. But your relator avers that the records of the Pension Office and the United States pension roll show that neither the respondent nor his predecessors in office have impartially administered the pension laws with respect to those persons who, while in the military or naval service of the United States and in line of duty, have lost an arm and leg; that while about one-sixth of the entire number thus disabled have been rated in the first class and are now pensioned at $72 per month by the favorable action of the respondent and his predecessors in the office of Commissioner of Pensions, the remaining five-sixths are suffered and permitted to receive but just one-half that rate for precisely the same disability. The aggregate sum paid to each of those persons who have thus been, by the respondent and his predecessors, rated in the first class as aforesaid exceeds the amount severally paid to those comrades refused such classification of their pension since June 6, 1866, by about $5,500.

13. And your relator says that he is the only person on
4 the United States pension rolls that has lost an arm at the shoulder and leg at the thigh. The following are the only persons whose names are borne on those rolls for the loss of an arm and leg or for the lesser disability of the loss of one hand and one foot, or who have received such wounds and injuries as have resulted in the total and permanent disability of the same equivalent to such loss, namely: Hiram Smith, Jr., certificate No. 54066, "loss of left arm near the shoulder and left leg;" Philo Bierce, certificate No. 41643, "loss of left arm near the shoulder, left leg, and shell wound calf of right leg;" Cordenio Bruce, certificate No. 65589, "loss of left leg at the hip joint and left hand;" John S. Fay, certificate No. 23111, "loss of right arm and right thigh;" George W. Clark, certificate No. 48246, "loss of right arm and right thigh;" Charles Lamb, certificate No. 159,987, "total loss use of right arm and right leg;" John J. Winn (navy), now deceased, widow's certificate No. 3465, "loss of left arm and left thigh;" Henry Schmidt, certificate No. 35234, "loss of right arm and right thigh;" Philip Kreig, certificate No. 44947, "loss of left arm and left thigh;" Philip A. B. Kennedy, certificate No. 78031, "loss of right arm and right leg;" Frank Rose, the relator, certificate No. 39330, "loss of left arm at the shoulder and right leg at the thigh;" Captain Henry A. Kircher,

certificate No. 36243, "loss of right arm near the shoulder and left leg above the knee;" Charles Lovely, certificate No. 44810, "loss of the left arm near the shoulder and right leg;" Lewis Martin, certificate No. 61049, "loss of right arm near the shoulder and left leg;" Henry Funking, certificate No. 60472, "loss of right arm at the shoulder and left leg;" Patrick Melvin (navy), "compound fracture right arm and right thigh; arm amputated below the elbow." The foregoing-named persons have severally a greater disability than results from the loss of one hand and one foot from the fact that one or both of their limbs are amputated above the elbow or knee. Those of them that have lost their limbs from the same side of the body are, of course, more disabled than their comrades whose limbs are lost from different sides of the person. The pension laws, however, make no distinction in their rate of pension. They all have substantially the same disability. In some instances the disabilities are precisely the same, as in the cases of Smith, Bierce (with the exception that he has received an ugly shell wound of calf of right leg), Bruce, Fay, Clark, Winn (now deceased), Schmidt, Kreig, and Kennedy.

All these persons are entitled to the same rate of pension under the general pension laws, and your relator avers that, because their said several disabilities result in helplessness equal in degree to that resulting from the loss merely of both hands or both feet or the total and permanent disability of the same, they now severally are, and have severally continuously been since June 6, 1866, entitled to a like rating therewith in the first class as aforesaid.

The following-named persons have sustained the loss of one hand and one foot—that is to say, the amputation is below the elbow and the knee—or have received such wounds and injuries as have resulted in the total and permanent disability of the same equivalent to such loss, namely: Clark A. Gardner, certificate No. 41985, "loss of left hand and right foot;" Edward Ferguson, certificate No. 43051, "loss of right foot and total and permanent disability of left arm, equivalent to loss of left hand;" John Britting, certificate No. 62826, "loss of right foot and total and permanent disability of left arm, equivalent to the loss of left hand," and Henry E. Bedell, certificate No. 68616, "loss of left foot and total loss use of right hand."

And your relator says that there are on the pension rolls two other cases, whose exceptionally great degree of helplessness includes the loss of an arm and leg or one hand and one foot, namely: Henry D. Fuller, certificate No. 59194, "loss of the sight of the right eye, left arm at the shoulder joint, left foot, and shell wound of right leg between the knee and ankle, resulting in compound comminuted fracture of bone, and a sloughing wound that has never healed," and Captain Oscar Dunlap, certificate No. 66419, "loss of right hand and right foot and fracture of skull and left jaw, resulting in epilepsy and the permanent impairment of mind and memory." These two cases are distinguished from the others named by reason of the additional wounds and injuries as specified, and for that reason they ought not to be considered in connection with those cases limited to

the loss of arm and leg or one hand and one foot, whether above or below the elbow.

14. And your relator says that the general pension laws contemplate granting equal pensions to all the aforesaid persons who have sustained the same or substantially the same disability. That such of them as have sustained a greater degree of disability than results from the loss of one hand and one foot by having lost an arm at the shoulder joint and a leg at the hip joint, or by having lost an arm near the shoulder and a leg above the knee, or by having lost an arm at or near the shoulder and a leg below the knee, or by having lost a leg at the hip and one hand, or by having lost a leg at the thigh and an arm below the elbow, or by having been totally and permanently disabled in the same, equivalent to such loss, are reduced to a degree of helplessness equal in all respects to that resulting from the loss merely of both hands or both feet or the total and permanent disability of the same, and are accordingly entitled, under the provisions of the laws aforesaid, to a like rate of pension therewith from June 6, 1866, as aforesaid.

And your relator further says that inasmuch as the disabilities of the persons severally named necessarily involve the loss of "one hand and one foot," or the total and permanent disability of both, and inasmuch as they have severally been finally adjudged by the respondent or his predecessors in office to have sustained such disability while in the military or naval service of the United States and in the line of duty, they are severally entitled, as matter of legal right, to the pension specifically provided for such disability by the pension laws, to wit, to a pension of $48 per month from March 3, 1883, and $60 per month from August 4, 1886, as aforesaid.

15. But your relator alleges that the records of the Pension Office and the pension rolls show that the respondent's predecessors in office adjudged the said John J. Winn (navy), now deceased (widow's certificate No. 3465); the said Henry Schmidt, certificate No. 35234, and the said Philip Kreig, certificate No. 44947, to have severally been so totally and permanently disabled—the said Winn from the "loss of the left arm and left thigh;" the said Schmidt from the "loss of the right arm and right thigh," and the said Kreig from the "loss of the left arm and left thigh"—as to be rendered utterly helpless, or so nearly so as to require regular aid and attendance of another person, within the meaning of the law, and rated them severally in the first class and at $72 per month from June 17, 1878, while they persistently refused a like adjudication and rating for the others named, whose disabilities are precisely the same in some as and greater in others than those of the three persons above named.

16. And your relator further alleges that the respondent, in the discharge of his official duties as Commissioner of Pensions, finally adjudged Philip A. B. Kennedy, Company "B," 36th Indiana Volunteers, certificate No. 78031, so totally and permanently disabled from the "loss of the right arm and right leg" as to be rendered utterly helpless, or so nearly so as to require regular aid and attendance of another person, within the meaning of the law,

and accordingly granted a rerating of his pension and an increase to $72 per month from June 17, 1878; yet, as your relator alleges, notwithstanding the action so taken in the Kennedy case, the respondent refused to make a like adjudication and to grant a like rerating and increase of pension to each of the following-named persons for the disabilities stated, which in some are identified with, in others greater than those of, Kennedy, namely: Hiram Smith, Jr., certificate No. 54066, "loss of left arm near the shoulder and left leg;" Philo Bierce, certificate No. 41643, "loss of the left arm near the shoulder, left leg and shell wound calf of right leg;" Cordenio Bruce, certificate No. 65589, "loss of left leg at the hip joint and left hand;" John S. Fay, certificate No. 23111, "loss of right arm and right thigh;" George W. Clark, certificate No. 48246, "loss of right arm and right thigh;" Charles Lamb, certificate No. 159,987, "total loss use right arm and right leg;" Frank Rose, your relator, certificate No. 39330, "loss of left arm at the shoulder and right leg at the thigh;" Captain Henry A. Kircher, certificate No. 36243, "loss of right arm near the shoulder and left leg above the knee;" Charles Lovely, certificate No. 44810, "loss of left arm near the shoulder and right leg;" Lewis Martin, certificate No. 61049, "loss of right arm near the shoulder and left leg," and Henry Funking, certificate No. 60472, "loss of right arm at the shoulder and left leg," and thus, as your relator avers, the respondent has not administered the general pension laws equally and impartially as to those persons who, while in the military or naval service of the United States and in the line of duty, were in like manner and in equal degree disabled by the loss of an arm and a leg, nor have those laws been equally and impartially administered at any time by the Pension Office with respect to this class of persons.

17. And your relator further alleges that by the discriminating action of the respondent and that of his predecessors in office the Pension Office has paid or caused to be paid out of the Treasury of the United States since June 6, 1866, to each—Winn, Schmidt, Kreig, and Kennedy—about the sum of $5,500 more than it has suffered or allowed to be paid to each of the following persons, namely: Smith, Bierce, Bruce, Fay, Clark, Lamb, Rose, Kircher, Lovely, Martin, and Funking, and they are now severally drawing double the pension (except Winn, now deceased) that is severally granted their said comrades, although they all have the same pensionable disability, excepting that Clark and Funking are each pensioned by special act of Congress at $50 per month, and excepting that the respondent has taken away all pension from Smith for the loss of his left leg, from Bruce for the loss of his left hand, and from
6 Martin for loss of the left leg, and continued it for the loss of the other limb at $45 per month from August 4, 1886, the respondent, as to them, holding and ruling that the laws of Congress grant $9 more pension per month for the loss of an arm at the shoulder joint or a leg at the hip joint, or so near thereto as to prevent the use of artificial limbs, than is thereby granted for the loss of both an arm at the shoulder joint and a leg at the hip joint.

18. And your relator further says that at the same time, or about

the same time, the respondent adjudged Kennedy to now be, and to have continuously been since discharge, so totally and permanently disabled by the "loss of the right arm and right leg" as to be rendered utterly helpless, or so nearly so as to require regular aid and attendance of another person, and accordingly granted him a rerating and increase of pension to the first class, from $36 to $72 per month, from June 17, 1878, the respondent had under advisement an application from the said Hiram Smith, Jr., for a like adjudication, arrears, and increase of pension for the "loss of his left arm near the shoulder and left leg," a disability in all respects equal to that of Kennedy, and entitled to a like rating therewith under the pension laws; but, as your relator avers, that, instead of adjudging Smith to now be, and to have continuously been since discharge, so totally and permanently disabled as to be rendered utterly helpless, or so nearly so as to require regular aid and attendance of another person, within the meaning of the law, as he had previously done in the case of Kennedy, the respondent took away all pension for the loss of his left leg and continued it for the loss of his arm only from August 4, 1886, at $45 per month, under the provisions of the act of that date, on the ground that his arm was amputated so near the shoulder as to prevent the use of an artificial arm, holding and ruling in Smith's case that the laws enacted by Congress grant a greater pension for the loss of either an arm at the shoulder joint or a leg at the hip joint, or so near thereto as to prevent the use of artificial limbs, than they do for both of these disabilities combined.

19. And your relator further says that, notwithstanding the action the respondent took as Commissioner of Pensions in the case of Kennedy as aforesaid, the respondent, in his annual report to the honorable Secretary of the Interior for 1887, speaking of the disabilities resulting from the loss of an arm and a leg, or from the loss of one hand and one foot, at page 19 of said report says:

"Some discretion should be lodged in the Commissioner in correcting discrepancies in rates of pension for loss of limbs, or Congress should be asked by direct enactment to establish a table of rates for loss of limbs. The existing laws upon this subject are inharmonious and are unjust. There is no sufficient reason why if the amputation of a leg at the hip joint entitles a claimant to $45 per month the loss of a leg and arm should together be rated at but $36. If, again, $45 be taken as a proper pension for a leg amputated at the hip joint, then the disability for performing manual labor from the loss of the foot and the hand should not be graded at a less figure."

20. But your relator denies that the pension laws grant $9 more pension per month for the loss alone of a leg at the hip joint than is thereby provided for such loss coupled with the loss of an arm at the shoulder joint; and he avers that it is only by the most tortious constructions of such laws that such meaning or such legislative intent and purpose can be deduced therefrom, or that such gross inequality and such manifest injustice can result from their administration; and he further denies that these laws, as they now exist, grant a less pension for the greater disability resulting from the loss of one hand and one foot than they provide for the lesser disability

resulting from the loss alone of a leg at the hip joint; and he avers that while the lesser disability is specifically pensioned at $45 per month by the act of August 4, 1886, the said greater disability is specifically pensioned at $60 per month by the act of February 28, 1877, and the said act of August 4, 1886. The construction of these acts of Congress is directly involved in your relator's petition for mandamus.

And your relator further avers that no laws enacted have received more careful thought and attention by the Legislature than have these same pension laws; that, instead of being the incongruous mass of preposterous legislation as represented, the pension laws, as they now exist, constitute a harmonious system, conferring equal benefits by granting equal pensions to those persons equally disabled in their country's service and in the line of duty. They were framed from time to time during the last twenty-five years by as able men and lawyers as sat during that period in either house of Congress; that the inequalities in the rates of pension hereinbefore pointed out arise out of no defect in these laws, but are the result of inefficient and incompetent administration of them.

21. And your relator further avers that the respondent, in adjudging Kennedy to now be, and to have continuously been since
7 his discharge, so totally and permanently disabled, within the language and true intent and meaning of the law, from the "loss of his right arm and right leg" as to be rendered utterly helpless, or so nearly so as to require regular aid and attendance of another person, and in granting him a rerating and increase of pension according to the first class, at $72 per month, correctly applied the law to the facts and gave to Kennedy no greater pension than he was entitled to for his said disability, which is in all respects equivalent to the loss merely of both hands, or the loss merely of both feet, or the total and permanent disability of the same, and that the respondent's predecessors granted no more than the law justly entitled them severally to in adjudging Winn for "loss of left arm and left thigh;" Schmidt for "loss of right arm and right thigh," and Kreig for "loss of left arm and left thigh," in like manner to be so disabled, and in granting a like rerating and increase of pension; but your relator says that he and his comrades, whose names and disabilities are hereinbefore given, being precisely the same, are justly entitled severally to a like adjudication at the hands of the respondent, as Commissioner of Pensions, and to a like rerating and increase of pension, which follow as a legal consequence such adjudication; yet, as your relator alleges, the respondent has refused the petition of your relator praying to be so adjudged and a rerating and increase of his pension accordingly, and your relator is suffered and permitted to draw a pension for the "loss of his left arm at the shoulder and right leg at the thigh" of only $36 per month, while the act of August 4, 1886, grants the specific pension of $45 per month for either of his said disabilities; and so in like manner, as your relator is informed and believes, the respondent has refused the like petition severally of his said comrades.

22. And your relator says that all persons who are pensioned in

the first class for other disabilities than are specifically mentioned in the law, to wit, the loss of the sight of both eyes or of the sight of one eye—the sight of the other having been previously lost—or the loss of both hands, or the loss of both feet, or the total and permanent disability of the same, are rated therein under the provision of the equivalent clause, so called, of the law; that this equivalent clause was first introduced in the law June 6, 1866, and is now incorporated in sections 4697 and 4698, Revised Statutes, and in the act of June 18, 1874; that the intention of the Legislature is to provide thereby for all persons who, under the circumstances as stated in the law, have sustained, otherwise than by the loss of the eyesight, the loss of both hands or the loss of both feet, any disability of equal degree therewith a pension of like amount with that granted for said specified disabilities.

23. And your relator further says that this clause of the law has never received a judicial interpretation; that it has never been administered by the Pension Office according to any fixed rule of construction as to its true intent and meaning; that, as the result, the grossest inequality exists as to those persons who have precisely the same disability, some being rated in said class and some being refused such classification, and, as a further result, many persons are now, as your relator is informed and believes, pensioned in the first class and rated at $72 per month for disabilities far short of the actual requirements of the law; and thus it is, as your relator avers, the Government is wronged in one case and the pensioner in another, and the rightful administration of this wise and just provision of the law is left, more or less, to chance.

Wherefore your relator says that public interest, as well as private right, requires that the following provisions of the pension laws should receive such judicial interpretation and construction as will tend to establish a fixed rule for guidance in their administration by the Pension Office and secure equal and impartial justice to and among those persons who are equally meritorious, equally disabled, and equally deserving to share equally in the nation's bounty, namely:

(1.) Whether the following provision of section 4697, Revised Statutes of the United States, viz., "Or who shall have been otherwise so totally and permanently disabled as to render them utterly helpless, or so nearly so as to require regular personal aid and attendance of another person," requires in any case a greater degree of helplessness than results from the loss merely of both hands, or the total and permanent disability of both, to entitle a claimant to a like rating therewith in the first class at $25 per month from June 6, 1866.

(2.) Whether the following provision of section 4698, Revised Statutes of the United States, viz., "Or otherwise so permanently and totally disabled as to render them utterly helpless, or so nearly so as to require regular personal aid and attendance of another person," requires in any case a greater degree of helplessness than results from the loss merely of both hands or both feet, or the permanent and total disability of the same, to entitle a claimant to a like

rating therewith in the first class at $31.25 per month from June 4, 1872.

(3.) Whether the following provision of the act of June 18, 1874, viz., "Or by any other injury resulting in total and permanent helplessness," requires in any case a greater degree of disability than results from the loss merely of both hands or both feet to entitle a claimant to a like rating therewith in the first class at $50 per month from June 4, 1874; and—

(4.) Whether those persons who, while in the military or naval service of the United States and in the line of duty, shall have sustained a greater degree of disability than results from the loss merely of one hand and one foot, or the total and permanent disability of the same, by having lost an arm at the shoulder joint and a leg at the hip joint, or by having lost an arm near the shoulder and a leg above the knee, or by having lost an arm at or near the shoulder and a leg below the knee, or by having lost a leg at the hip joint and a hand, or by having lost a leg at the thigh and an arm below the elbow, or by having been totally and permanently disabled in the same equivalent to such loss, are, within the true intent and meaning of said provisions of the law, so totally and permanently disabled as to render them utterly helpless, or so nearly so as to require regular aid and attendance of another person; and, if so, are they entitled to be rated under said provisions of the law at $25 per month from June 6, 1866, $31.25 per month from June 4, 1872, and $50 per month from June 4, 1874, provided they were on, or entitled to be on, the United States pension roll on said 6th day of June, 1866?

25. And, finally, your relator represents that the law affords no direct proceeding for the judicial adjudication of the questions herein presented that are constantly arising in the administration of the pension laws; that the proper and rightful interpretation, construction, and administration of those laws in that behalf involve the annual expenditure of large sums of the public treasure of the United States, as well as the private rights, under said laws, of your relator and his comrades in like manner or in equal degree with himself disabled; that for want of such judicial adjudication, interpretation, and construction the most glaring inequalities have sprung up in the matter of the rates of pension, of which the foregoing cases are but a few instances. The attention of the court will be called to numerous other instances in the argument at the hearing of this petition; that in many cases the rate of pension is largely in excess of what the law allows and to the prejudice of the Government, while in others, as, for instance, in the case of your relator and his said comrades, the rate allowed is less than that provided by the laws and to the prejudice of the pensioner. Wherefore your relator, considering the public interest as well as the private rights of your relator and his comrades involved therein, in the utmost best faith, humbly prays that this honorable court, actuated by the same public considerations that moved the Supreme Court of the United States in that early day to deliver an extra judicial opinion in the case of The United States *ex relatione* William Marbury *vs.* James

Madison, Secretary of State, 1 Cranch, 137, may hear your relator's petition and listen to argument thereon respecting the construction and meaning of those provisions of the pension laws hereinbefore particularly specified, and that the court may deliver its opinion, though extra judicial it be, upon the questions propounded, involving the interpretation, construction, and the true meaning of said provisions, to the end that these salutary laws enacted for the relief of those persons disabled in the late civil war and in the line of duty may be impartially administered by the granting of equal pensions for equal disabilities.

And your relator further prays that, considering the averments contained in the ten first paragraphs of his petition, the peremptory writ of mandamus may issue out of this honorable court, directed to the respondent, John C. Black, commanding him, as Commissioner of Pensions, to forthwith reissue your relator's said pension certificate at $48 per month from March 3, 1883, and $60 per month from August 4, 1886, for the loss of your relator's left arm at the shoulder and right leg at the thigh, considered as involving the loss merely of the left hand and right foot, first deducting all pension that has been paid your relator on account thereof since the 3d day of March, 1883, and further commanding the respondent to do and perform all other matters and things whatsoever the law requires to be done and performed in all the premises; and to this end your relator will ever humbly pray.

FRANK ROSE.

J. G. BIGELOW,
Solicitor for Relator.

STATE OF NEW HAMPSHIRE, }
County of Merrimack, } *ss:*

I solemnly swear that I have heard — the foregoing petition by me subscribed and know the contents thereof; that the facts therein stated of my own knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

FRANK ROSE.

Subscribed and sworn to before me this 2 day of January, 1888.

A. J. SHURTLIFF,
Justice of the Peace and Clerk of the Supreme Court for the County of Merrimack, in the State of New Hampshire.

[Endorsed:] No. 28377. Law docket 32. The United States *ex relatione* Frank Rose *vs.* John C. Black, Commissioner of Pensions. Petition for the writ of mandamus. J. G. Bigelor, solicitor for relator, Webster Law Building.

9 Referred to the general term of the court.

W. S. COX, *J.*

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, sitting in general term, commencing fourth Monday, January 23, 1888.

Present: Presiding, Chief Justice Edward F. Bingham, and Alexander R. Hagner, Charles P. James, and William M. Merrick, associate justices.

MONDAY, *January* 23*d*, 1888.

By order of the justices presiding the court is opened by proclamation of the marshal, pursuant to rule of court.

* * * * * * *

TUESDAY, *February* 21, 1888.

Session resumed pursuant to adjournment.
Present: Chief Justice Bingham and Justices James and Cox.

* * * * * * *

THE UNITED STATES *ex relatione* FRANK ROSE
vs.
JOHN C. BLACK, Commissioner of Pensions. } At Law. No. 28377.

For mandamus.

This cause coming on to be heard, on motion of the relator
10 for a rule on the respondent to show cause, and counsel having been heard thereon, it is thereupon, on due consideration thereof, this 21 day of February, 1888, by the court ordered, adjudged, and decreed that the motion be, and the same hereby is, overruled; and it is further ordered, adjudged, and decreed that the petition be, and the same hereby is, dismissed.

E. F. BINGHAM,
Chief Justice.

* * * * * * *

THURSDAY, *March* 8, 1888.

Session resumed pursuant to adjournment.
Present: Chief Justice Bingham and Justices James and Cox.

THE UNITED STATES *ex relatione* FRANK ROSE
vs.
JOHN C. BLACK, Commissioner of Pensions. } At Law. No. 28377.

For mandamus.

The petitioner in this cause having sued out a writ of error to the Supreme Court of the United States on the final judgment of this court dismissing the petition, the bond is fixed in the penalty of one hundred dollars.

By the court:

E. F. BINGHAM,
Chief Justice.

11 In the Supreme Court of the District of Columbia, the 8th day of March, 1888.

THE UNITED STATES *ex relatione* FRANK ROSE
vs.
JOHN C. BLACK, Commissioner of Pensions. } No. 28377.

In error.

Know all men by these presents that we, Frank Rose, Ira Gordon, and Charles R. Miller, are bound unto the above-named John C. Black, Commissioner of Pensions, in the sum of one hundred dollars, to be paid to the said John C. Black, Commissioner of Pensions, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 8th day of March, 1888.

Whereas the above-named Frank Rose, relator, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Frank Rose, relator, shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

FRANK ROSE, [SEAL.]
By J. G. BIGELOW, *His Att'y.*
IRA GORDON. [SEAL.]
CHARLES R. MILLER. [SEAL.]

Sealed and delivered in presence of—
J. G. BIGELOW.

Approved:
E. F. BINGHAM,
Chief Justice.

[Endorsed:] Filed Mar. 9, 1888. R. J. Meigs, clerk.

12 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is in the said court before you, between The United States *ex relatione* Frank Rose and John C. Black, Commissioner of Pensions, being No. 28377, at law, a manifest error hath happened, to the great damage of the said relator, as by his complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the

parties aforesaid in this behalf, therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 9th day of March, in the year of our Lord 1888, and of the Independence of the United States the one hundred and twelfth.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *To wit:*

To John C. Black, Commissioner of Pensions:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The United States *ex rel.* Frank Rose is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected so that speedy justice be done the parties in that behalf.

Witness E. F. Bingham, chief justice of the said supreme court of the District of Columbia.

E. F. BINGHAM,
Chief Justice.

13 [Endorsed:] No. 28377. Law. The United States *ex rel.* Frank Rose *vs.* John C. Black, Com'r of Pensions. P. M'ch 15, '88. Joyce. Writ of error and citation.

Served copy of the within writ of error & citation on John C. Black, Commissioner of Pensions, M'ch 15, 1888.

A. A. WILSON, *Marshal.*

J. G. BIGELOW, *Att'y.*

14 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 16th day of March, 1888.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 16 day of March, 1888.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 16th day of March, 1888.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

Endorsed on cover: District of Columbia supreme court. No. 1403. The United States *ex rel.* Frank Rose, plaintiff in error, *vs.* John C. Black, Commissioner of Pensions. Filed April 2, 1888.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *ex-relatione*,
FRANK ROSE,
Plaintiffs in Error
vs.
JOHN C. BLACK,
COMMISSIONER OF PENSIONS,
Defendant in Error.

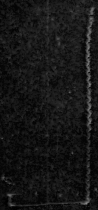
For Mandamus.
No. 1403

In Error to the Supreme Court of the District of Columbia.

MOTION BY THE RELATOR TO ADVANCE THIS CASE UNDER CLAUSE 6, RULE 26, OF THE COURT.

J. G. BIGELOW,
Attorney for plaintiffs in error.

WASHINGTON, D. C.:
BYRON S. ADAMS, PRINTER,
514 EIGHTH STREET.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *ex-relatione*,
FRANK ROSE,
Plaintiffs in Error
vs.
JOHN C. BLACK,
COMMISSIONER OF PENSIONS,
Defendant in Error.

For Mandamus.
No. 1403

In Error to the Supreme Court of the District of Columbia.

MOTION BY THE RELATOR TO ADVANCE THIS CASE UNDER CLAUSE 6, RULE 26, OF THE COURT.

And now comes the above-named relator, and moves the Court to advance this cause, and for a speedy hearing thereof, on the following grounds:

1. The petition in this case is for the peremptory writ of mandamus against the respondent as Commissioner of Pensions. It was filed in the Court below, January 13, 1888, and was certified by the Justice holding the Circuit Court to the Gen-

eral Term, to be heard in the first instance. The Court in General Term refused the relator's motion for a rule on the respondent, and dismissed his petition without a hearing thereof on the merits.

2. The Court below having refused the relator a hearing on the matters alleged in his petition, the case is still an *ex parte* proceeding, though brought into this Court by writ of error on final judgment dismissing the petition.

3. The respondent was not brought into the Court below. His citation to appear in this Court in the first instance results from the anomalous action of the Supreme Court of the District of Columbia refusing the relator the right to a hearing on his said petition. We do not admit that the respondent can be brought into Court in this manner.

4. The questions presented by the petition are of great importance to the relator, involving his legal rights under the laws of the United States.

5. The tenure of office of the respondent as Commissioner of Pensions is of uncertain duration.

We submit herewith our brief and argument on the merits of the case.

J. G. BIGELOW,
Attorney for plaintiffs in error.

To JOHN C. BLACK, Commissioner of Pensions,
Defendant in error.

You will please take notice that we shall on Monday, the 30th day of April, A. D. 1888, submit the motion, of which the foregoing is a copy, to the Supreme Court of the United States, for its judgment thereon.

J. G. BIGELOW,
Attorney for plaintiffs in error.

Office Supreme Court U. S.
FILED.
APR 23 1888
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *ex-relatione*,
FRANK ROSE,
Plaintiffs in Error
vs.
JOHN C. BLACK,
COMMISSIONER OF PENSIONS,
Defendant in Error.

For Mandamus.
No. 1403.

In Error to the Supreme Court of the District of Columbia.

Brief of Plaintiffs in Error.

J. G. BIGELOW,
Attorney for Plaintiffs.

BYRON S. ADAMS, PRINTER.

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Attorney for plaintiffs in error.

Office Supreme Court U. S.
FILED.
APR 23 1888
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *ex-relatione*,
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For Mandamus.
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In Error to the Supreme Court of the District of Columbia.

Brief of Plaintiffs in Error.

J. G. BIGELOW,
Attorney for Plaintiffs.

BYRON S. ADAMS, PRINTER.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *ex-relatione*,
FRANK ROSE,
Plaintiffs in Error
vs.
JOHN C. BLACK,
COMMISSIONER OF PENSIONS,
Defendant in Error.

For Mandamus.
No. 1403.

In Error to the Supreme Court of the District of Columbia.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE RELATOR'S CASE.

The petition of the relator, Frank Rose, was filed in the Court below on January 13, 1888, and sets forth:

1. That he was in the military service of the United States during the late Civil war, and served in Company D, 57th New York Volunteers; that in battle and in the line of duty he re-

ceived such wounds as resulted at the time thereof in the amputation of his left arm at the shoulder, and right leg at the thigh; that respondent's predecessors in the office of Commissioner of Pensions have so found and adjudged the facts to be; that such finding of the facts was ratified and confirmed by the then Secretary of the Department of the Interior, as is evidenced by the relator's Pension Certificate, No. 39,330, signed by the then Secretary, and countersigned by the then Commissioner of Pensions, and sealed with the Departmental seal, whereby a pension is granted unto him as for the loss of one hand and one foot, as necessarily merged in his said greater disability of the loss of an arm at the shoulder and a leg at the thigh.

2. That for his said disability, considered as necessarily involving the loss of one hand and one foot, he has been pensioned at the following rates, namely: $20 per month from March 3, 1865, under the provisions of Section 4,697, R. S., U. S.,* (Pension Ll. p. 5); $24 per month from June 4, 1872, under the provisions of Section 4,698, R. S., U. S., (Pension Ll. p. 6), and $36 per month from February 28, 1877, under the provisions of the act of Congress of that date, construed with reference to the following provision of said Section, 4,698, namely: "and all persons who, under like circumstances, shall have lost one hand or one foot * * * * * shall be entitled to a pension of eighteen dollars per month," which is his present rate of pension.

3. That the said act of February 28, 1877, is as follows: "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled: That all persons who, while in the military or naval service of the United States, and in the line of duty, shall have lost ONE hand and ONE foot, or been totally and permanently disabled in both, shall be entitled to a pension for EACH of SUCH disabilities, and at such a rate as is provided for by the provisions of

*NOTE: For convenience of reference, the Pension Laws are referred to in pamphlet as published by the Pension Office, and copies are left for the members of the court with the clerk.

the existing laws for EACH disability; provided, That this act shall not be so construed as to reduce pensions in any case." (Pension Ll. 38.)

4. That at the time of the passage of this act, the said Section, 4,698, R. S., U. S., among other things, provided, "And all persons who, under like circumstances, shall have lost ONE HAND or ONE FOOT * * * * * shall be entitled to a pension of eighteen dollars per month;" that this provision of the law, providing a pension of $18 per month for the loss of either a hand or foot, remained in full force until superseded by the act of Congress of March 3, 1883, which, among other things, provides, "That from and after the passage of this act, all persons on the pension rolls, and all persons hereafter granted a pension, who, while in the military or naval service of the United States, and in the line of duty, shall have lost ONE HAND or ONE FOOT * * * * * shall receive a pension of twenty-four dollars per month (Pension Ll. 56, 57); that this provision granting a pension of $24 per month for the loss of either a hand or foot, continued in force until, in turn, superseded by the act of August 4, 1886, which, among other things, provides, "That from and after the passage of this act, all persons on the pension rolls, and all persons hereafter granted a pension, who, while in the military or naval service of the United States, and in line of duty, shall have lost ONE HAND or ONE FOOT * * * * * shall receive a pension of thirty dollars per month." (Pension Ll. 68.)

5. That these laws are in *pari materia*, relate to the same subject matter, and together constitute a code providing the rate of pension, for the period covered, the relator is entitled to receive for the loss of his left arm at the shoulder and right leg at the thigh, considered as necessarily involving the loss of one hand and one foot.

6. That the relator, having been so finally adjudged to have lost one hand and one foot, as necessarily merged in the loss of his arm at the shoulder and his leg at the thigh, is entitled

thereby to a pension of $24 per month for the loss of his hand, and to a like pension of $24 per month for the loss of his foot, from March 3, 1883, or of $48 per month for the loss of both, and to a pension of $30 per month for the loss of his hand, and to a like pension of $30 per month for the loss of his foot, from August 4, 1886, or of $60 per month for the loss of both. And that the respondent as Commissioner of Pensions, is not suffered nor permitted by the law to exercise any judgment or discretion in the premises, but is in duty bound by the law to so re-issue the relator's said Pension Certificate.

7. That the relator has demanded of the respondent, as Commissioner of Pensions, the re-issue of his said Pension Certificate with the increased rating at $48 per month, from March 3, 1883, and $60 per month from August 4, 1886, for the loss of his left arm at the shoulder and the right leg at the thigh, considered as necessarily involving the loss of one hand and one foot, so finally adjudged, as aforesaid, to have been sustained by the relator in the military service of the United States and in the line of duty; and that the respondent, as Commissioner of Pensions, has refused and still refuses to so re-issue the relator's said Pension Certificate, or to discharge his plain legal duty under the law, and the relator is suffered and permitted to receive a pension only of $36 per month, when the law expressly provides that, for the precise disability he has been finally adjudged to have sustained in the military service of the United States and in the line of duty, a pension shall be granted of $48 per month from March 3, 1883, and $60 per month from August 4, 1886.

Hence the relator's petition and his prayer for the peremptory writ of mandamus against the respondent as Commissioner of Pensions, requiring him to re-issue the relator's said Pension Certificate with the increased rate at $48 per month from March 3, 1883, and $60 per month from August 4, 1886, as expressly provided by law. (Record pp. 1 to 4.)

NOTE: Paragraphs from 11 to 25 inclusive of the petition, contain no averments material to the legal questions involved, and need not be considered.

The cause was certified by the Justice holding the Circuit Court to the General Term to be heard in the first instance.

In that Court the relator moved for the alternative writ, or for a rule on the respondent. The motion was heard and refused and the petition dismissed.

Thence the relator sued out the writ of error, gave bond and cited the respondent to appear in this Court, though the cause has never progressed beyond an *ex parte* proceeding. (Record pp. 13 to 17.)

No opinion was filed in the case.

Assignment of Errors.

1. The Court erred in holding that the respondent, as Commissioner of Pensions, is authorized to grant a less or different rate of pension to the relator, than is specifically provided by law.

2. The Court erred in holding that the respondent, as Commissioner of Pensions, is charged with or can exercise any discretion whatever, in the matter of the rate of the relator's pension.

3. The Court erred in not holding the rate of the relator's pension to be specifically fixed by law.

4. The Court erred in not holding the said provisions of Section 4,698, the said act of February 28, 1877, the said provisions of the act of March 3, 1883, and the act of August 4, 1886, to be in *pari materia*, to be co-existent, and together to constitute a code of laws specifically fixing the rate of pension for the disability resulting from the loss of one hand and one foot.

5. The Court erred in refusing to hold that under the provisions of said act of February 28, 1877, construed with the said provisions of the act of March 3, 1883, the relator is en-

titled, as a matter of legal right, to a pension of $24 per month for the loss of his hand, and to a like pension of $24 per month for the loss of his foot, from March 3, 1883, and of $48 per month for the loss of both.

6. The Court erred in refusing to hold and rule that the said provisions of the act of February 28, 1877, construed with the said provisions of the act of August 4, 1886, grant to the relator the specific rate of $30 per month for the loss of his hand, and the like specific rate of $30 per month for the loss of his foot, from August 4, 1886, and of $60 per month for the loss of both.

7. The Court erred in not holding the relator's case to be specific under the law, and the rate of pension to be expressly and specifically fixed by the law.

8. The Court erred in holding that the relator has no vested legal right, in and to his pension, to entitle him to be heard in these proceedings.

9. The Court erred in ruling that the respondent, as Commissioner of Pensions, has the right and the authority under the law, in the exercise of his discretion, to reduce the rate of, or to altogether withhold, the relator's pension.

10. The Court erred in holding the relator to have other legal remedy for the redress of his grievances, than these proceedings.

11. The Court erred in refusing the relator's motion for the alternative writ, and dismissing his petition.

ARGUMENT.

This assignment of errors is intended to direct the judicial mind to the questions of law involved in the petition, rather than to exemplify any rulings the Court below actually made. The only thing, that is understood, the Court in fact did decide is, that the relator has the right to petition Congress for redress of his grievances, and error is not assigned of this, as there can be no pretext that such a right is a legal remedy.

For a full discussion of the scheme adopted by Congress for the granting of pensions, I refer to my brief and argument in the case of Captain Oscar Dunlap, submitted herewith to the Court. Here I simply observe that the Pension Laws divide all pensioners into two classes with respect to disability, whether resulting from an objective or a subjective cause, that is, whether from external injury or disease. The first class is known to the law as the "specific class," because the rate of pension is specifically fixed by the law. The other class in known as the "non specific class," because the Commissioner of Pensions, in the exercise of his judgment and discretion, is charged with the responsibility of fixing the rate of pension as well as determining the degree of disability and whether the same was incurred in the service and line of duty, being restricted to within the rate of $18 per month. (Sections 4,698, 4,699, R. S. Pension Ll. 5 and 6.) For every disability, no matter from what cause. that has been finally adjudged to have been incurred in the military or naval service of the United States, and in the line of duty, and to be equivalent to the disability resulting from the loss of a hand or a foot, is pensionable at a rate that is particularly and specifically named in the law, and the same is true of all greater or higher degrees of disability. In all such cases the Commissioner of Pensions can exercise no discretion as to the amount or rate of pension. His discretionary duties with respect to this class, cease with having determined the degree of disability, and that the same was incurred in the service and line of duty. The law commands the balance and the way in which it shall be done, suffering and permitting the exercise of no discretion on the part of any body.

The case of the relator is for the loss of one hand and one foot, as necessarily merged in the loss of his arm at the shoulder and leg at the thigh. His claim, as made by his petition, is in a nut shell. It is that he has been finally adjudged to have lost his hand and foot in the military service and in the line of duty, and that such adjudication is conclusively evidenced by his Pension Certificate, and that since the issuance thereof Congress

has passed two acts, namely, the act of March 3, 1883, and August 4, 1886, whereby the rate of pension for the particular disability for which he is pensioned is specifically increased from $36 to $48, and thence to $60 per month. The laws under which this claim is made are as follows: Section 4,698 Revised Statutes of the United States, (Pension Ll. 6,) among other things provides that "all persons who under like circumstances shall have lost ONE hand or ONE foot * * * * * shall be entitled to a pension of eighteen dollars per month." And while this provision of the law was in full force, Congress passed the act of February 28, 1877, namely, "That all persons who, while in the military or naval service of the United States and in the line of duty shall have lost ONE hand and ONE foot, or been totally and permanently disabled in both, shall be entitled to a pension for each of such disabilities, and at such a rate as is provided for by the provisions of the existing laws for each disability." (Pension Ll. 38.)

The said provision of Section 4,698 was superseded by the act of March 3, 1883, namely: "That from and after the passage of this act all persons on the pension roll, and all persons hereafter granted a pension, who, while in the military or naval service of the United States, and in the line of duty, shall have lost ONE hand or ONE foot * * * * * shall receive a pension of twenty-four dollars per month." (Pension Ll. 56 and 57.)

And this provision of the act of March 3, 1883, is, in turn, superseded by the act of August 4, 1886, namely: "That from and after the passage of this act all persons on the pension rolls, and all persons hereafter granted a pension, who, while in the military or naval service of the United States, and in the line of duty, shall have lost ONE hand or ONE foot * * * * * shall receive a pension of thirty dollars a month." (Pension Ll. 68.)

Now the petitioner is rated at $36 per month under the said act of February 28, 1877, and the said provision of Section 4,698 providing a pension of $18 per month for the loss of either a

hand or foot. And the respondent, as Commissioner of Pensions, has refused to reissue his Pension Certificate with the increase of rate as provided in the subsequent acts of March 3, 1883, and August 4, 1886, which have superseded this provision of said section.

Thus it will be seen that the only question in the case is of law involving the construction of these laws. All the duties of the Commissioner of Pensions, involving the exercise of judgment and discretion have long since been performed. These duties were fully discharged when the relator had been finally adjudged by the Pension Office to have lost his arm at the shoulder, and leg at the thigh by wounds received in battle while in the military service of the United States, and his Pension Certificate issued. The law fixes the rate of pension. The Legislature has thought it proper to establish the specific rate of pension in all cases of these higher degrees of disability and has done so, thus releiving the Commissioner of Pensions of all responsibility with respect thereto.

And the sole question presented is, Are these acts of February 28, 1877, March 3, 1883, and August 4, 1886, co-existing laws for the respective periods thereby covered? In other words, is the act of February 28, 1877 to be successively interpreted and construed with the acts of March 3, 1883, and August 4, 1886? or shall it continue to be construed with the obsolete, superseded provision aforesaid of Section 4,698?

The act of February 28, 1877 does not profess to fix the rate of pension for the loss of one hand and one foot, but plainly declares that all persons, who, while in the military or naval service, and in the line of duty shall have sustained such loss, "shall be entitled to a pension for each of such disabilities, and at such a rate as is provided for by the provisions of the existing laws for each disability." The "existing laws" to-day provide for each of these disabilities a pension of $30 per month.

Suppose a soldier in the United States Army should now lose one hand and one foot from wounds received in the line of duty in an engagement with a band of hostile Indians, and

should apply for a pension on account thereof, upon being discharged the military service. Is he to be pensioned under the law containing the latest expression of the Legislative will? or is he to pensioned under the provisions of laws long since superseded or repealed and now obsolete?

These questions, it seems to me, suggest their own answer. That these laws ought to be so construed as to give effect to the true intent of the Legislative mind, and to avoid incongruity and glaring inequality with respect to equally meritorious claimants, who are equally disabled from wounds sustained in battle, can admit of no possible doubt. What justice or equality then can there be in holding that the loss of one hand and one foot entitles this relator to a pension for each of such disabilities, and at such a rate as is provided for by the provisions of the existing laws for each disability from February 28, 1877, to the passage of the act of March 3, 1883, and from thence, that he is not entitled to be so rated? If the loss of a hand and foot justly entitled the petitioner to a pension for each disability, when each is pensionable at $18 per month, why should not such double disability entitle him to a pension for each, when each is pensionable at $24 or $30 per month?

Again, why should the Pension Laws be so construed as to prevent all increase of pension for those persons who have sustained this double disability, when the pension of all persons who have but a single disability has been doubled and trebled? There is no equality nor justice in this, and Congress must be conclusively presumed to have intended no unjust discrimination against the relator and his comrades who have been in like manner disabled from wounds received in battle These comrades altogether number not to exceed twenty-five persons. They are all equally interested in these proceedings, which cannot possibly affect any pensioner who has not lost one hand and one foot, or been totally and permanently disabled in both.

Now let us see what Congress has done by way of increasing pensions, for this is the best source of getting at the intent of the Legislative mind.

The loss of both hands is pensioned from July 4, 1864, at $25; the loss of both feet at $20; and from March 3, 1865, the loss of one hand and one foot is pensioned the same as the loss of both feet at $20 (Section 4,697, Revised Statutes, U. S). The loss of both hands and the loss of both feet are coupled together from June 4, 1872, and each is pensioned at $31.25, while the loss of one hand and one foot is rated at $24, (Section 4,698, Revised Statutes, U. S). The pension for the loss of both hands or of both feet is further increased to $50 from June 4, 1874, (act of June 18, 1874, Pension Ll. 35 and 36). Then follows the said act of February 28, 1877, granting a double pension for the loss of a hand and foot, and thereby an increase from $24 to $36. But the pension for the loss of both hands or both feet is further increased to $72 by the act of June 17, 1878, (Pension Ll. 42), while by the construction given to the laws under consideration by the Pension Office, the rate for the loss of a hand and foot remains at $36, or just one-half that for the loss of both feet. On the other hand give to the laws the construction the relator is contending for, and the loss of one hand and one foot will be rated at $60 from August 4, 1886, and the relative positions will be restored, inequality will be avoided and justice done. Which did Congress intend? Again the loss of a hand or foot is rated at $15 from June 6, 1866, (Section 4,697), at $18 from June 4, 1872, (Section 4,698), at $24 from March 3, 1883, (act of March 3, 1883, Pension Ll. 56 and 57), and at $30 from August 4, 1886, (act of August 4, 1886, Pension Ll. 68). But the loss of a hand or foot is pensioned less than the loss of an arm at or above the elbow, or a leg at or above the knee, and the loss of an arm at or above the elbow, or a leg at or above the knee is pensioned at a less rate than the loss of an arm at the shoulder or a leg at the hip joint, or so near thereto as to prevent the use of an artificial limb. As to which, see Section 4,698, R. S., U. S., "the act to increase pensions in certain cases," of June 18, 1874, (Pension Ll. 36), "An act for relief of certain pensioners" of March 3, 1879, (Pension Ll. 46), the act of March

3, 1883, (Pension Ll. 56 and 57), act of March 3, 1885, (Pension Ll. 66), and of August 4, 1886, (Pension Ll. 68). By this last named act it is expressly provided "that all persons now on the pension rolls, and all persons hereafter granted a pension who in like manner shall have lost either an arm at the shoulder joint, or a leg at the hip joint, or so near the joint as to prevent the use of an artificial limb, shall receive a pension at the rate of forty-five dollars per month." Here it is expressly provided that for either the disabilities the relator has a pension of $45 per month shall be granted, and it is true that every person now on the pension rolls who has lost either an arm or a leg at the point the relator has lost either, is now in receipt of a pension of $45 per month, $9 per month more than the petitioner is granted for the combined loss. Has he then any cause to complain? Has he any grievance to redress?

Will this Court allow such a construction to be placed on these laws enacted by Congress, working such glaring injustice and acquit itself, as the Court below did, by saying the relator has a right to petition the Legislature, or will the Court recognize the clear legal right of the relator, and exert its judicial authority to secure the rightful interpretation of the laws and their due administration with respect to this petitioner, and the handful of his comrades, whose disabilities are from causes open to ocular demonstration, and of and concerning which there is not, and cannot be, anything problematical or uncertain? Their limbs were torn from their bodies by the bursting shells of the enemy, right in the heat and thick of battle. The great equity of the statutes strongly inclines to the cause of such claimants, because of the certainty of the justice of their claim.

Now the rule for construing these laws is a plain and simple rule. It is that they shall be construed together, one with reference to the other, because it takes them all to make up the code or the system of laws providing a pension and fixing the rate thereof for the loss of a hand and foot. This Court cannot want any authorities for this. The rule is of the alphabet of

the law. A desire to give expression and effect to the Legislative mind suggests the rule. It is founded in justice and right.

Construed by this rule the said acts of February 28, 1877, and of March 3, 1883, together grant the specific rate of pension to the relator for the loss of his hand and foot of $48 per month, from March 3, 1883, and the said act of February 28, 1877, and the said act of August 4, 1886, by the same rule of construction, together grant the specific rate of $60 per month, from August 4, 1886, for the loss of one hand and one foot. And what other duty has the Commissioner of Pensions to perform than the simple ministerial duty of executing the mandate of the law? No matter what may be his opinion of the law, the law remains the same. Its requirements can only be satisfied by a compliance therewith on the part of the respondent. And this is all the relator prays for. And it is plain that the law affords no other legal remedy than by mandamus.

But if the respondent was at liberty to cancel the pension of the relator, or to reduce the amount thereof, a mandamus would not lie, and this suit would be but idle ceremony. A pension is a gratuity on the part of the Sovereign. But who is to enjoy the bounty is not left to the discretion of the Commissioner of Pensions, or any body else. It rests solely with Congress to say who shall receive such bounty at the hands of the Government, If, however, there should be a phenomenal growth of an arm and a leg in the place of those the relator lost in his country's service, and they should prove equally as good and useful to him, then the Commissioner of Pensions might find some warrant of authority in Section 3, act of June 21, 1879 (Pension Ll. 46), to reduce or altogether withhold the relator's pension. But nothing short of an event involving a breach of nature's well-known laws, can authorize the Commissioner of Pensions to cancel the petitioner's pension, as the law now stands.

It necessarily follows, then, that the relator has a vested, legal, property right in and to his pension, sufficient to entitle him, not only to maintain this suit, but to a respectful consideration of his grievance, and to the redress thereof, or some legal reasons from the court why the relief prayed for cannot be granted, and not be put off by being reminded that he has the right to petition Congress for such redress. He asks only what the law plainly ordains he shall have upon the final adjudication that has been made in his case. He does not complain that the laws, as they now exist, are inadequate to grant a full measure of justice for the disability resulting from the loss of one hand and one foot. He has, therefore, no reason to petition Congress for redress.

There is no issue of fact or law in this case. It is an *ex parte* proceeding here. The Court below refused the motion for the alternative writ, and the relator had to take a judgment of dismissal of his petition in order to get a hearing before this Court. But the case is not here on its merits. The only question that presents itself, is: Has the petitioner made out in his petition a *prima facie* right to the writ of mandamus? If he has, then I submit, the Court below erred in refusing his motion for a rule on the respondent to show cause why the writ should not issue as prayed.

But, if I can be permitted to go outside of the record, I will say that I am informed that the reason why the Pension Office has not heretofore granted an increase to the relator and his comrades who have in like manner lost a hand and foot, under the said acts of March 3, 1883, and August 4, 1886, construed with the said act of February 28, 1877, is that the Pension Office discovered that the title of the said act of February 28, 1877, is incongruous with the body of the act, and took the title to be the law instead of the body of the act. And herein, it seems to me, is the only question that can possibly arise in this case.

THE TITLE OF THE ACT IS:

"AN ACT TO ALLOW A PENSION OF THIRTY-SIX DOLLARS PER MONTH TO SOLDIERS WHO HAVE LOST BOTH AN ARM AND A LEG."

THE BODY OF THE ACT IS:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That all persons who, while in the military or naval service of the United States, and in the line of duty, shall have lost one hand and one foot, or been totally and permanently disabled in both, shall be entitled to a pension for each of such disabilities, and at such a rate as is provided for by the provisions of existing laws for each disability: Provided, That this act shall not be so construed as to reduce pensions in any case."

"Approved February 28, 1877."

It will be readily seen that there is no harmony between the title and the body of the law. The title makes provisions only for a soldier, and only for the loss of "an arm and a leg," none for the lesser disability of the "loss of one hand and one foot," the greater necessarily merging the less, but the less not the greater. Under the title the loss merely of "one hand and one foot" cannot be pensioned. Again, the title provides a pension of $36 per month for the collective disability of the loss of an arm and leg, refers to no other laws or provisions of law and is complete of itself.

The body of the act, on the other hand, provides as well for a sailor as a soldier, provides a double pension for the loss of "one hand and one foot," (which is necessarily merged in the loss of an arm and a leg,) that is, it provides a pension for the loss of the hand and a pension for the loss of the foot, but specifies no amount for either, simply and plainly declaring that the rate shall be the same as is provided by the provisions of existing law for each loss.

The title and the body of the act are both couched in such plain language as to need no interpretation at the hands of the Court.

If the title is to be taken as the law instead of the body of the act, it is perfectly clear that the relator has now received, and is now in receipt of, all the pension he is entitled to. On the other hand, it is equally clear that, if the body of the act, instead of its title, be taken as the law, the petitioner is entitled for the loss of his hand and foot to a pension of $48 from March 3, 1883, and of $60 from August 4, 1886.

Now, which is to be taken as the law, the title or the body of the act? The Pension Office says, "the title." The relator says, "the body of the act."

But it is by far more important to know what the Supreme Court of the United States has to say about it. Next in importance is to know what this Court has already said on this question, whether the body of legislation is to yield to its title, or the title to the body of legislation, when the two are incongruous. In the case of Hadden *et al. vs.* Barney, 5 Wall, 107, this Court, speaking through Mr. Justice Field, delivered its opinion on this question in the following language:

"The title of an act furnishes little aid in the construction "of its provisions. Originally in the English Courts the title "was held to be no part of the act. "No more" says Lord "Holt, "than the title of a book is a part of the book." Mills "*vs.* Wilkins, 6 Mod., 62. It was generally framed by the "clerk of the House of Parliament, where the act originated, "and was intended only as a means of convenient reference. "At the present day the title constitutes a part of the act, but "it is still considered as only a formal part; *it cannot be used "to extend or restrain any positive provisions contained in the "body of the act.* It is only when the meaning of these is "doubtful that resort may be had to the title, and even then it "has but little weight. It is seldom the subject of special con- "sideration by the legislature. These observations apply with "special force to the acts of Congress. Every one who has had

" occasion to examine them, has found the most incongruous " provisions, having no reference to the matter specified in the " title. Thus, the law regulating appeals in Mexican land " cases, to the District Courts of the United States from the " Board of Commissioners, created under the of March 3, " 1851, is found in an act making appropriations for the civil " and diplomatic expenses of the Government for the year end- " ing June 30, 1853, and for other purposes. Act of June 30, " 1853, Ch. 108, (10 Stat. 98.)

" The law declaring that in the courts of the United States " there shall be no exclusion of any witness on account of color, " nor in civil actions when he is a party to or interested in the " issue tried, is contained in a proviso to a section in the ap- " propriation act of 1864, the section itself directing an appro- " priation for the detecting and punishing the counterfeiting of " the securities and coins of the United States. Act July 2, " 1864, Ch. 210 (13 Stat. 351)."

When I say that the title of this act has exerted an influence hostile to the right and interest of the relator and his comrades who have in like manner lost a hand and foot in the construction of these laws, I speak advisedly, for my attention has been called to the Departmental rulings, in substance, holding that the title controlled and restricted the plain language of the body of the act.

It matters not that this Court may be of the opinion that the title of this act is not even to be referred to in the construction of these laws, the fact remains that it has played and still does play, an important part in their administration by the Pension Office. And herein is found the most cogent reason why the rule to show cause should issue in this case. It is the province and duty of the judiciary, in all cases properly before the court, to hear argument upon controverted questions, involving interpretation and meaning of the laws, and to give such laws an authoritative construction for the guidance of the executive officers whose duty it is to execute them.

There is one other thing to which I will call the attention of the Court, and that is this: The inquiry will undoubtedly suggest itself, why is not this soldier pensioned in the first class? His arm is amputated at the shoulder and leg at or near the hip, and surely his disability therefrom is equivalent to the loss merely of both feet, and, in justice, ought to be rated therewith. My answer to this inquiry is, that there can be no question but that the Legislature intended that all persons who, under the circumstances, as stated in the law, have sustained a greater disability than results from the loss of "one hand and one foot," that is particularly mentioned in the law, by having lost these limbs above the elbow and the knee, should be rated in the first-class under the equivalent clauses of the law providing a like rate of pension with the loss of both hands or both feet for an equal degree of disability from other causes than such loss (Sections 4,697, 4,698, R. S., act of June 18, 1874, Pension Ll. pp. 6, 7 and 35). But whether the relator has the degree of disability that is particularly specified in these laws to entitle him to such classification, is a question involving the exercise of judgment and discretion, some little judgment and discretion, not much, some, and, of course, the writ of mandamus will not lie to direct how that little judgment and discretion shall be exercised. For a more particular examination of these equivalent clauses, I refer to my brief and argument in the Dunlap case, submitted herewith to the Court.

But the relator has been found and finally adjudged to have lost one hand and one foot from wounds received in the military service and in the line of duty, and has been, and now is pensioned accordingly. And the only question remaining in his case is, Is he in receipt of the specific rate of pension that is specifically provided by the law for such disability? If he is not, then the writ ought to issue, requiring the respondent to reissue his certificate with ratings conformable to the requirements of law.

For these reasons I respectfully submit to the Court that the relator has clearly made out, by his petition, a *prima facie* case for the alternative writ, and that the Court below erred in denying his motion therefor, and, therefore, its judgment ought to be reversed with directions to grant said motion.

J. G. BIGELOW,

Attorney for relator.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 992.

THE UNITED STATES EX RELATIONE FRANK ROSE,
PLAINTIFF IN ERROR,

vs.

JOHN C. BLACK, COMMISSIONER OF PENSIONS, DEFENDANT IN ERROR.

In Error to the Supreme Court of the District of Columbia.

J. G. BIGELOW,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

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In Error to the Supreme Court of the District of Columbia.

BRIEF IN REPLY TO DEFENDANT IN ERROR.

In the defendant's brief, filed herein by the assistant attorney general, this case is characterized as "an application for a mandamus to compel the Commissioner of Pensions to increase the allowance of the relator as a pensioner."

This statement of the case would indicate that the Commissioner of Pensions had some discretion in fixing the rate of petitioner's pension, but it so happens that the Legislature itself has seen fit to fix that rate and to kindly relieve the respondent of all responsibility on this score. The law fixes the rate of pension for the loss of one hand and one foot, and the complaint in the petition is that the respondent refuses to obey the law by refusing to reissue the relator's cer-

tificate at the increased rates expressly provided by the acts of March 3, 1883, and August 4, 1886, taken in conjunction with the act of February 28, 1877. (Pension Ll., pp. 38, 56, and 68.)

The first ten paragraphs of the petition present the relator's case for the writ of mandamus. The balance of the petition, paragraphs eleven to twenty-five, inclusive, presents a case for the extrajudicial opinion of the Court, and on the 6th of October, instant, I filed in the case a supplemental brief in behalf of the relator and his comrades in like manner with himself disabled. At pages 1, 5, 10, 15, 20, and 25 will be seen the photographs of the relator, Hiram Smith, Jr. Philo Bierce, John S. Fay, George W. Clark, and Cordenio Bruce, six of the persons named as interested in the Court declaring, in effect, that the ruling of Secretary Chandler in the Henry Schmidt case, given therein in full at pages 8, 9, 10, 11, and 12, was adopted, ratified, and confirmed by Congress in the subsequent act of February 28, 1877. And herein I refer to this supplemental brief, and particularly to the legislative history of Senate bill 234, that will be found in full on pages 19 to 22, and which eventually, through the House substitute, became this act of February 28, 1877.

It is indispensably necessary to carefully consider this supplemental brief in order to get a thorough understanding of the case made for mandamus. I therefore invite the attention of the Court to the argument and showing therein made. At first I had great misgivings whether I could make out such a case as to satisfy the Court that it would be its duty to pronounce its opinion, though extrajudicial it might be, on the questions I have therein presented for your honors' consideration; but now I have none. The transcendent importance of the case in that respect and the showing made justify me in the belief that the Court will, as well in the interests of the Government as in the interests of these brave and heroic soldiers, the photographs of the mangled living remains of a few of whom are seen in the

brief as illustrative of their utter helplessness, pronounce its judgment to the effect that the Legislature did adopt and ratify by the act of February 28, 1877, the decision of Secretary Chandler referred to as the correct exposition of the then existing pension laws with respect to those persons who have sustained a greater disability than results from the loss of "one hand and one foot," in the loss of these limbs, one or both, near the body.

But the petition for mandamus is to compel the respondent to obey the mandate of the law as applicable to the loss merely of one hand and one foot, for which lesser loss the relator is already pensioned, as necessarily merged in his said greater loss of an arm at the shoulder and leg at the thigh—that is to say, he is pensioned as for the loss of "one hand and one foot," and this disability is specifically rated at $48 from March 3, 1883, and $60 per month from August 4, 1886, by the acts of February 28, 1877, March 3, 1883, and August 4, 1886, the former declaring that "all persons "who, while in the military or naval service of the United "States and in the line of duty, shall have lost ONE HAND AND "ONE FOOT or been totally and permanently disabled in both "shall be entitled to a pension for each of such disabilities "and at such a rate as is provided for by the provisions of "*the existing laws* for each disability;" and the act of March 3, 1883, provides "That from and after the passage of this "act all persons on the pension roll and all persons here-"after granted a pension who, while in the military or naval "service of the United States and in the line of duty, shall "have lost ONE HAND OR ONE FOOT or been totally and per-"manently disabled in both * * * shall receive a pen-"sion of twenty-four dollars per month;" and the act of August 4, 1886, provides "That from and after the passage "of this act all persons on the pension rolls and all persons "hereafter granted a pension who, while in the military or "naval service of the United States and in the line of duty, "shall have lost ONE HAND OR ONE FOOT or been totally and

" permanently disabled in the same shall receive a pension " of thirty dollars per month." (Pension Ll., pp. 38, 56, and 68.)

The act of February 28, 1877, is a coexisting law with these subsequent acts, and here again I refer to my supplemental brief in this case, at pages 19 to 33.

There can be no defense in this case, and there is nothing in the brief of the assistant attorney general that is in any way responsive to the case as made by the petition.

And now, referring to the brief in reply to defendant in error in Dunlap's case, pp. 8 to 18, inclusive, and making what is therein said part of my argument here as though the same was here again repeated, I respectfully submit to the Court that the relator is entitled to the peremptory writ of mandamus as in his said petition prayed.

J. G. BIGELOW,
Attorney for Plaintiff in Error.

Supreme Court U. S.
FILED
OCT 8 1888
JAMES H. MCKENNEY
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, *Ex relatione*
FRANK ROSE, *Plaintiff in Error,*
vs.
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} No. 992.

In Error to the Supreme Court of the District of Columbia.

Supplemental Brief for Plaintiff in Error.

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Frank Rose, the petitioner,
Certificate No. 39330

IN THE

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THE UNITED STATES, *Ex relatione* FRANK ROSE, *Plaintiff in Error*, vs. JOHN C. BLACK, *Commissioner of Pensions, Defendant in Error.* } No. 992.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

The petition of the relator from paragraphs one to ten, inclusive, sets forth the loss of one hand and one foot, as necessarily involved in the greater loss of his arm at the shoulder and leg at the thigh; that he is now pensioned for such lesser loss, but is refused the specific rate the law provides therefor. And the petitioner prays for mandamus to compel the respondent to reissue his certificate with the rates that are specifically provided by the acts of February 28, 1877, of March 3, 1883, and August 4, 1886, namely, $48 per month from March 3, 1883, and $60 from August 4, 1886, as for the loss of one hand and one foot.

As to the relator's right to such relief reference is made to the brief and argument in his behalf, filed herein at the last term of the Court.

Frank Rose the petitioner,
Certificate No. 37330

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, *Ex relatione*
FRANK ROSE, *Plaintiff in Error,*
vs.
JOHN C. BLACK, *Commissioner of Pensions, Defendant in Error.*

No. 992.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

The petition of the relator from paragraphs one to ten, inclusive, sets forth the loss of one hand and one foot, as necessarily involved in the greater loss of his arm at the shoulder and leg at the thigh; that he is now pensioned for such lesser loss, but is refused the specific rate the law provides therefor. And the petitioner prays for mandamus to compel the respondent to reissue his certificate with the rates that are specifically provided by the acts of February 28, 1877, of March 3, 1883, and August 4, 1886, namely, $48 per month from March 3, 1883, and $60 from August 4, 1886, as for the loss of one hand and one foot.

As to the relator's right to such relief reference is made to the brief and argument in his behalf, filed herein at the last term of the Court.

This Supplemental Brief is addressed to the subject-matter of the balance of the petition, paragraphs eleven to twenty-five, inclusive, and the prayer therein contained for the extra judicial opinion of the Court upon the questions propounded. And herein lies the great importance of this case.

The petition sets forth that the relator has sustained in the loss of his left arm at the shoulder and right leg at the thigh, a much greater disability than results from the loss of one hand and one foot, that is specifically pensioned at the rates above given, though necessarily involving such loss, and is in all respects equivalent to that resulting from the loss merely of both hands or both feet, and that he is entitled to a like rate of pension therewith, under the clauses and provisions of the law cited, namely, $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874; and $72 per month from June 17, 1878. That the said clauses and provisions of the law are not now by the respondent, and heretofore have not been by his predecessors in office, uniformly construed and impartially administered as to those claimants for pension who have precisely the same kind and degree of disability from precisely the same cause or causes. That while certain persons who have sustained a greater disability than results from the loss of one hand and one foot, by having lost these limbs, one or both, near the body, have been, and are now, pensioned in the first class, at the rates above given, the relator and his said comrades, who have precisely the same disability and from exactly the same cause or causes, are allowed but half that rate. That this inequality and injustice arise out of no defect in the laws themselves, but from the want of their rightful interpretation by the Pension Office. That, as the consequence of this inequality in the administration of these clauses and provisions of the law, the sum of about $5,500 more has been paid to those persons severally, thus graded in the first class, since June 6, 1866, than has been allowed the relator and his comrades severally for precisely the same kind and degree of disability from precisely the same cause or causes. And that

all those persons that are now, and heretofore have been, thus graded in the first class, at the rates above specified, are, and have been, properly and rightfully pensioned, and have been rated in the first class, as the law comtemplates they should be for their said disabilities, and that the refusal by the respondent and his predecessors in office to grant a like rating of pension to the relator and to his said comrades severally, is a denial to him and them of their just rights under the pension laws.

On the other hand, the petition sets up as the result of this want of uniformity in the construction and interpretation of these clauses and provisions of the law, that many persons are now rated in the first class and pensioned at $72 per month for various disabilities that are far short of the requirements of the law, and but approximately what the relator's are, and that the Government is thereby prejudiced.

The petitioner, therefore, prays for the extra judicial opinion of the Court:

1. That the following provision of Section 4,697, Revised Statutes of the United States, viz.: "Or who shall have been "otherwise so totally and permanently disabled as to render "them utterly helpless, or so nearly so as to require regular "aid and attendance of another person," requires in no case a greater degree of disability than—in all cases substantially as great as—results from the loss of both hands, or from the total and permanent disability of both, to entitle a claimant to a like rate of pension therewith at $25 per month from June 6, 1866.

2. That the following provision of Section 4,698, Revised Statutes of the United States, viz.: "Or otherwise so perma- "nently and totally disabled as to render them utterly helpless, "or so nearly so as to require regular personal aid and attend- "ance of another person," requires in no case a greater degree of helplessness than—in all cases substantially as great as—results from the loss of both hands or both feet, or the total and permanent disability of the same, to entitle a claimant to a like rate of pension therewith at $31.25 per month from June 4, 1872.

3. That the following provision of the act of June 18, 1874,

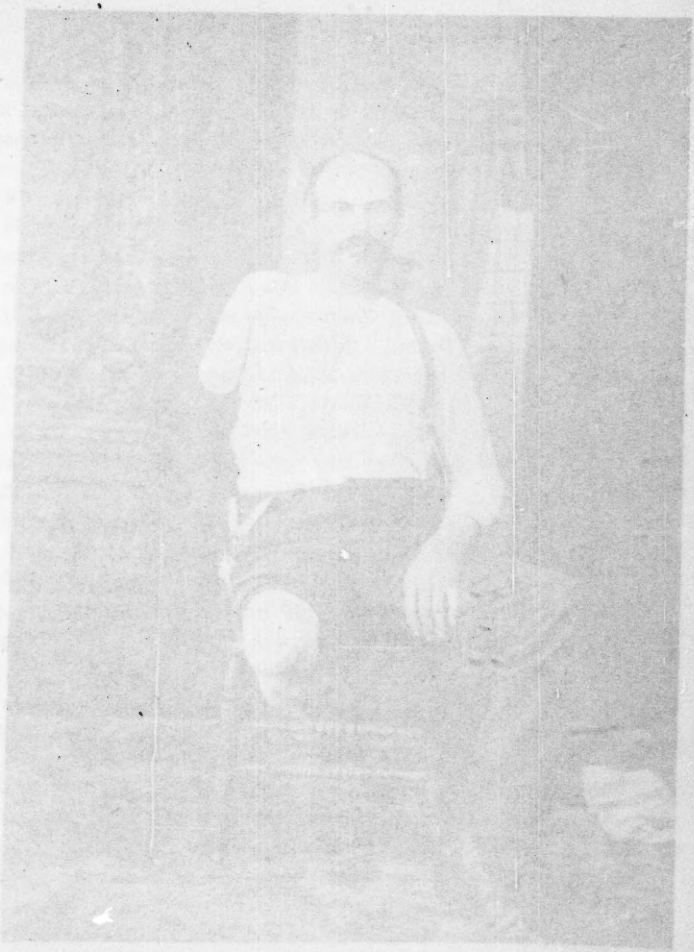
viz.; "Or by any other injury resulting in total and permanent "helplessness," requires in no case a greater degree of helplessness than—in all cases substantially as great as—results from the loss of both hands or both feet, to entitle a claimant to a like rate of pension therewith at $50 per month from June 4, 1874. And—

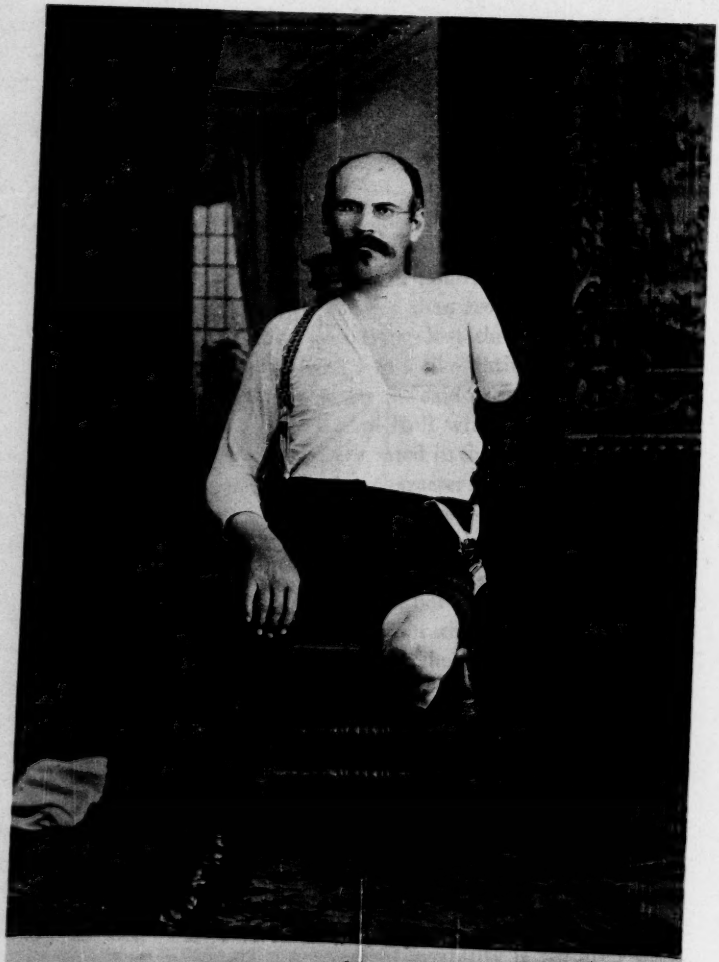
4. That the relator and his said comrades who have sustained a greater degree of disability than results from the loss of one hand and one foot by having lost these limbs, one or both, near the body, are entitled to a like rating with the loss of both hands or both feet, under the said provisions of the law.

An examination of the Pension Roll will show that a considerable number of persons are rated in the first-class, because of the particular phase in the character of their disabilities "requiring regular aid and attendance of another person," rather than the degree of their helplessness, addressed, not merely to the question of aid and attendance, nor to the question of inability to earn one's livelihood, nor yet to the question of let and hindrance to locomotion, but rather to the whole field of discomforture, as contemplated by the law. The scheme is, equal pensions for equal disabilities.

The word "otherwise" in the provision in question, in Section 4,697, means from other causes than total blindness, the loss of both hands, or the total and permanent disability of both, and the words "or so nearly so as to require regular aid and attendance of another person," are words of limitation upon the meaning of the preceding words, "or who shall have been otherwise so totally and permanently disabled as to render them utterly helpless," and the meaning of the whole provision is that in no case, a greater degree of disability is required than, but in all cases substantially as great as results from the causes specified, to entitle a claimant to a like rate of pension therewith at $25 per month from June 6, 1866.

In like manner the word "otherwise," in substantially the same provision of Section 4,698, means from other cause or causes than total blindness, the loss of both hands or both feet,





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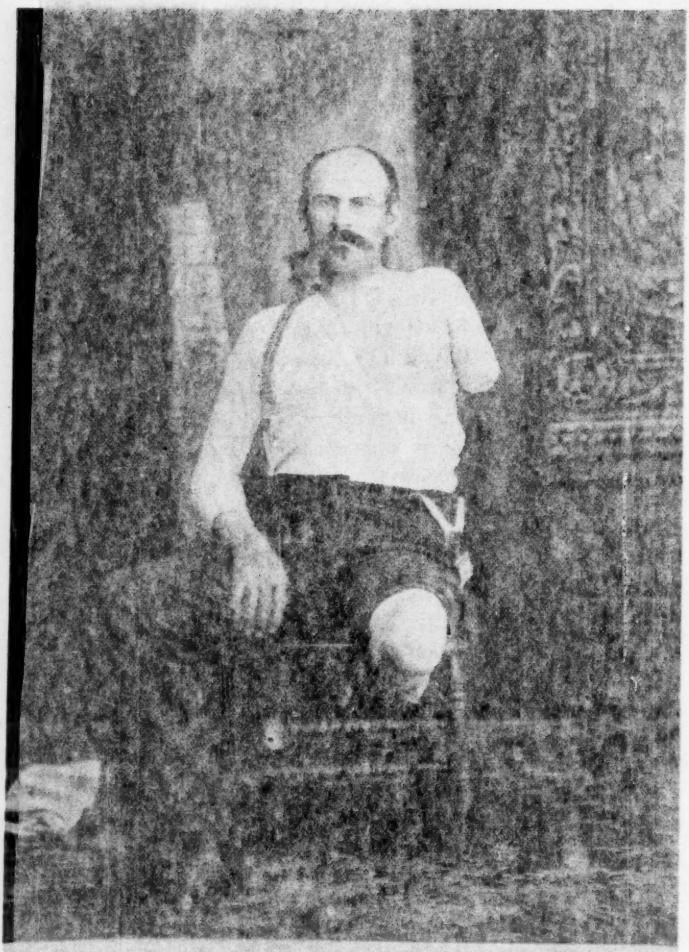
or the total and permanent disability of the same, and the whole provision requires in no case a greater degree of helplessness than—in all cases substantially as great as—results from the causes specified, to entitle a claimant to a like rating of $31.25 from June 4, 1872.

But the relator, and his comrades, in like manner, and in equal degree with himself disabled, are not so much interested in the construction and general application of these provisions of the law, as they are in the particular question, whether these laws contemplate they shall severally be rated in the first-class at $26 per month from June 6, 1866, $31.25 from June 4, 1872, $50 from June 4, 1874, and $72 per month from June 17, 1878. And I take it upon myself to show that the Pension Laws are susceptible of no other reasonable nor rightful interpretation.

Referring again to Section 4,697, it will be seen that the loss of both hands is rated at $25 per month from July 4, 1864, and from the same date the loss of both feet at $20 per month. Eight months thereafter, and from March 3, 1865, the loss of one hand and one foot is rated with the loss of both feet at $20 per month. No provision was made for a like rate of pension for an equivalent disability until June 6, 1866, more than one year thereafter. The inequality of the law in this respect had manifested itself, during this period, to Congress, and to relieve against it these equivalent clauses, so called, were incorporated in the law. Prior to June 6, 1866, the loss of both legs at the hip, and the loss of an arm at the shoulder and a leg at the hip, as in the case of the relator, could be rated only as for the loss merely of both feet or for the loss merely of one hand and one foot, although a much greater disability. No one would contend that the loss of both legs at the hip ought not to be rated in a class higher than the loss merely of both feet, if the law provided for such higher class. No one would contend the loss of an arm at the shoulder and a leg at the hip ought to be rated in no higher class than the loss merely of one hand and one foot, if the law provided for a higher class. The law did



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or the total and permanent disability of the same, and the whole provision requires in no case a greater degree of helplessness than—in all cases substantially as great as—results from the causes specified, to entitle a claimant to a like rating of $31.25 from June 4, 1872.

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provide for a higher class during the time in question, but it contained no apt provision to satisfy the demand for equality. Congress saw the defect and, on June 6, 1866, provided the needful remedy. And after providing the like rate of $25 per month for those persons who "shall have been permanently and totally disabled in both hands," the law contains the further provision, "or who shall have been otherwise so totally and permanently disabled as to render them utterly helpless, or so nearly so as to require regular personal aid and attendance of another person, shall be entitled to a pension of twenty-five dollars per month" from June 6, 1866. Now, did the Legislature intend that a person who had lost both legs at the hip should be rated under this clause at $25 per month, or to continue still to receive $20 per month as for the loss merely of both feet, because of the fact that such lesser disability is necessarily involved in the amputation of the legs at the hip? Did Congress intend that a person who, like the petitioner, had lost an arm at the shoulder and a leg at the hip, should be rated under this clause at $25 per month from June 6, 1866, or to continue still to receive but $20 per month as for the loss merely of one hand and one foot, because, forsooth, such loss is necessarily merged in the amputation of the arm at the shoulder and leg at the hip? This would be very unjust. The inequality that was sought to be avoided by these equivalent clauses would still exist. This would defeat the very object for which they were incorporated in the law. The loss of both legs at the hip results in a much greater disability than the loss merely of both feet. The loss of an arm at the shoulder and a leg at the hip entails a much greater degree of helplessness than the loss merely of one hand and one foot. These disabilities are each equivalent to the loss merely of both hands, or to the permanent and total disability of both. Congress knew of the existence of such cases, and intended to provide for each an equal rate of pension with the loss of both hands, by the act of June 6, 1866. That was the very purpose of these equivalent

clauses. But as we proceed this purpose on the part of the Legislature becomes more manifest.

From June 4, 1872, the loss of both feet is rated with the loss of both hands at $31.25 per month, while the loss of one hand and one foot is rated at $24 per month.

Now, assuming that the loss of both feet is a less disability than results from the loss of both hands, then the rating of such loss in the first class, with the loss of both hands, has the tendency to lower the standard of requirement of the following clause of Section 4,698, viz.: "or otherwise so permanently and totally disabled as to render them utterly helpless, or so nearly so as to require the regular personal aid and attendance of another person," to a degree of helplessness equivalent to that resulting from the loss of both feet or the total and permanent disability of both, to entitle a claimant to a like rate of $31.25 from June 4, 1872.

The loss merely of a hand and foot is not sufficient, for such loss is specifically rated in the class below, at $24 per month, but the greater disability resulting from the amputation of these limbs, one or both, near the body, is sufficient. And this Section, 4,698, is susceptible of no other reasonable construction.

Remembering that these laws are in *pari materia*, and are to be construed, one provision with reference to another, I call attention to the first proviso of this section, viz: "PROVIDED, THAT ALL PERSONS WHO, UNDER LIKE CIRCUMSTANCES HAVE LOST A LEG ABOVE THE KNEE, AND IN CONSEQUENCE THEREOF ARE SO DISABLED THAT THEY CANNOT USE ARTIFICIAL LIMBS, SHALL BE RATED IN THE SECOND CLASS AND RECEIVE TWENTY-FOUR DOLLARS PER MONTH, FROM AND AFTER JUNE FOURTH, EIGHTEEN HUNDRED AND SEVENTY-TWO."

Now, is it to be supposed that Congress contemplated such inequality, such injustice, and I may say, iniquity, in these laws, as to grant the same rate of pension to one person for such loss alone of the leg as to his equally meritorious comrade, who had not only lost his leg, under precisely the same circumstances, but in addition thereto had lost his hand also? On

the contrary, it is manifest that Congress intended that this greater disability should be rated in the first class with the loss of both hands or both feet. And more manifest still will this intent appear as we proceed.

By the act of June 18, 1874 (Pension Ll., p. 36), it is provided, "That all persons who are now entitled to pensions under existing laws, and who have lost either an arm at or above the elbow, or a leg at or above the knee, shall be rated in the second class, and shall receive twenty-four dollars per month" from June 4, 1874.

Is it to be supposed that Congress intended by this act to grant the same rate of pension for the single loss as for the loss of both an arm and a leg?

The truth is Congress then supposed that such greater disability was then rated where it was entitled to be, in the first class.

But the petition sets forth that certain of the persons who had sustained a greater disability than results from the loss of one hand and one foot by having lost one or both of these limbs near the body, have been rated in the first class and are now pensioned at $72 per month. Among them is Henry Schmidt, Certificate No. 35,234, "loss of right arm and right thigh."

Schmidt made an application to be rated in the first class. The Commissioner of Pensions referred it to the Secretary for his opinion. And on February 11, 1876, the following Departmental decision was rendered in the case:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Feb'y* 11, 1876.

To the Commissioner of Pensions.

SIR: I return herewith the papers which accompanied your letter of the 29th ult., submitting the claim for increase of penston of Henry Schmidt, pensioner under Cert. No. 35,234, and requesting the decision of this Department upon the questions involved therein, and in other claims for increased pension, in view of the act of Congress, approved June 18, 1874, which

allows a pension of $50 per month under certain circumstances.

The papers in Schmidt's case show that, while in the service and line of duty, he sustained a gun-shot wound in the left shoulder, and wounds in the right arm and right leg, which resulted in the amputation of those limbs near the shoulder and hip joint, respectively, and that for all these disabilities he is now drawing a monthly pension of $24, under Section 4 of the act of March 3, 1873.

The surgeon who examined the claimant on the 2d day of December, 1874, rated the whole disability at $31.25 per month, or first grade; but a board of surgeons who examined him in your office on the 20th ult. rated his disabilities separately, as follows: For loss of arm $24, for loss of leg $24, and for injury to left shoulder $2 per month, but conclude their report by saying, "we find his disability as described above to be equal to and entitling him to second grade, $24 per month."

It thus appears that Schmidt is laboring under disabilities, which, separately rated, entitle him apparently to a total pension of $50 per month, but for which, taken as an entire disability, the law provides a pension of only $24 per month. The manner in which this seeming inconsistency has arisen will be apparent from the following reference to former legislation in regard to permanent and specific disabilities.

The act of June 6, 1866, provided pension for three classes or "grades"—as termed by your office—of permanent disabilities or their equivalent in each case, allowing for the first class a pension of $25 per month; for the second class $20, and for the third class a pension of $15 per month.

In classifying these specific disabilities the framers of the law placed the loss of a hand or foot in third or lowest class, and the loss of both feet, or of a hand and foot, in the second class, while in the first, or highest class, such injuries as the total loss of sight, the loss of both hands, &c. The rates of pension fixed for these classes were increased by the act of March 3, 1873, from $15, $20 and $25 per month to $18, $24 and $31.25 per mouth, respectively.

It is clear that prior to March 3, 1873, the law recognized the loss of a hand and foot as a much greater disability than the loss of only one of these extremities, and the loss of both hands as entitling the sufferer to a higher pension than if he had lost both feet; but the act of Congress approved on that date placed the latter disability in the highest class, or on the same footing as the loss of both hands, and advanced the loss of a foot at or above the knee from the $18 to the $24 class, while an act entitled "An act to increase pension in certain cases," approved June 18, 1874, similarly the rate for loss of a hand at or above the elbow.

Thus two additional specific disabilities were created by the law and provided for, viz: the loss of a leg or an arm, the rate for either of which was fixed at $24 per month, leaving the rate of $18 per month for the loss of a hand or a foot undisturbed, but in thus discriminating between the loss of a limb and its extremity, Congress failed to provide specifically for the loss of an arm and leg, leaving this serious disability to be rated for under the provision for the loss of a hand and foot. The result of this imperfection in the law is, that Schmidt is drawing a pension, to which either of his more serious injuries entitle him, and he is, in effect, drawing a pension of $24 per month for the loss of one limb, and *nothing* for the loss of the other. Inasmuch as he is entitled to his present pension for the loss of his leg, and as the loss of his arm is a still greater disability, when considered with reference to his ability to maintain himself by his own exertions, it is apparent that the highest pension allowed by the act of March 3, 1873, viz: $31.25 (or an advance of only $7.25 upon the rate now allowed him) is not commensurate with the sum total of his disabilities, and the question, therefore, arises whether they entitle him to the liberal provision made by the act entitled "An act to increase the pensions of soldiers and sailors who have been totally disabled," and approved June 18, 1874.

The first section of that act grants a pension of $50 per month to any person, "who, while in the military or naval ser-

Yours truly
Philo Bierce
Co. "A" I. O. L. A.
Certificate No. 41,643

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Yours truly
Philo Bierce
Co. A 1 O. L. A.
Certificate No. 1

vice of the United States, and in the line of duty, shall have been so permanently and totally disabled as to require the regular personal aid and attendance of another person, by the loss of the sight of both eyes or by the loss of the sight of one eye, the sight of the other having been previously lost, or by the loss of both hands, or by the loss of both feet, *or by any other injury resulting in total and permanent helplessness*," and the proviso forbids the allowance of such pension "by reason of any of the injuries herein specified, unless the same have resulted in permanent, total helplessness, *requiring the regular personal aid and attendance of another person.*"

Schmidt's disabilities are not specifically provided for by the act, and his title to its benefits must therefore inure, if at all, by force of the language thereof underscored by me. The disability of the pensioner is shown by the surgical examinations to be "total" in the sense contemplated by the law, and "permanent," but that he is in a condition of total "helplessness" is not so apparent, if the word "helplessness" is to be used in its extremest sense. I do not, however, think that this word should be so understood, especially in view of the qualifying language which follows in the provisio. Total or absolute "helplessness" implies utter physical prostration, but if the word was used in that sense by the framers of the law, there was no occasion for the requirements as to personal aid and attendance, as such a condition would obviously require the latter; besides the application of the word in that sense would necessarily exclude from the benefits of the act, all cases, wherein a state of physical prostration was not shown to exist, and I do not believe that such was the design of Congress in passing said act.

The word "helplessness" as used in the act and proviso, should, in my opinion, be understood as referring not only to the physical helplessness of the party, which compels him to depend at times upon the personal aid and assistance of another person, but also to his helplessness, *i. e.*, inability, to gain a subsistence by his own exertions. If, therefore, the injuries

sustained by Schmidt, have not only totally incacpaitated him from earning a livelihood, but rendered him to such a state of physical helplessness, that, in the ordinary and necessary affairs of life, he is dependent, at stated intervals, upon the aid and attendance of others, his case must be regarded as coming within the operation of said act of July 18, 1874.

It appears from the report of the office board of surgeons, that Schmidt wears an artificial leg, but on account of the shortness of the stump, cannot use one with a foot attached, and that the wound in the shoulder was caused by two musket balls. They state that the wound is healed, but that the grasp and use of the arm are somewhat impaired. Schmidt alleges that frequently the wound becomes sore so that the arm is of little use to him.

I think it must be conceded that Schmidt's injuries totally incapacitate him from earning a subsistence by his own exertions, and that a man in his disabled condition must require the regular aid and assistance from other persons, in eating, dressing and undressing, and in many other actions necessary in man's daily life. Viewing the claim in all its aspects, I have reached the conclusion, that, although the physical condition of the pensioner may not entirely fulfil the requirements of the act of June 18, 1874, it is such as to justify the allowance to him of the pension therein provided, in the absence of any other provision of existing law, which is commensurate with the extent of his injuries. * * * *

Z. CHANDLER,
Secretary.

Recorded in letter book 3, folio 158, *et seq.* Department of the Interior.

While I agree in the conclusion reached in this case, I cannot share in the doubts expressed in the Secretary's opinion as to the degree of Schmidt's disability entitling him to a classification of his pension in the first class with the loss merely of both hands, or the loss merely of both feet. On the contrary, the disability resulting from the loss of the right arm and right

leg as stated, (the trifling gunshot wound of the left shoulder cuts no figure in the case,) in my judgment, abundantly justifies the adjudication made in his behalf. It is difficult to conceive of a more overwhelming disability than results from the loss, from the same side of the person, of both an arm and leg so near the body. Considered as a let or hindrance to locomotion, it is fully as great a disability as results from the loss of both feet. Considered with reference to the resulting inability to earn a livelihood, it dwarfs the disability of the loss of both feet; and considered with reference to the requirement of the regular aid and attendance of another person, the loss of both feet is scarcely comparable with it.

Schmidt has the same base for locomotion a bicycle has, but less of equilibrium. He wears an artificial leg without a foot, not because he *can*, but because he is *obliged* to. It is manifest that he can neither dress nor undress himself without assistance. He cannot wash his remaining hand, nor button the sleeve to his garments around the remaining wrist. He cannot tie a knot, nor pare an apple, nor peel a potato, nor prepare his food for mastication. In all these particulars he requires aid and attendance, while a person who has lost both feet needs none.

Again there is no trade at which he can earn his living. He cannot be a cigar-maker, nor a shoemaker, nor a tailor, nor indeed, can he be a teacher of instrumental music. One hand is the help-meet to the other, and the loss of either, necessarily reduces the person thus disabled to such a condition of helplessness as to require regularly, day by day, the assistance of others. Couple with it the loss of a leg at the hip, and you have a degree of disability that fully answers all the requirements of these provisions, to enable a claimant to the highest grade of pension provided by the general Pension Laws.

What has been said applies with equal force to the cases of the relator and his said comrades.

But this is not all there is to the Henry Schmidt case.

Congress has ratified and confirmed the above opinion of

sustained by Schmidt, have not only totally incacpaitated him from earning a livelihood, but rendered him to such a state of physical helplessness, that, in the ordinary and necessary affairs of life, he is dependent, at stated intervals, upon the aid and attendance of others, his case must be regarded as coming within the operation of said act of July 18, 1874.

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While I agree in the conclusion reached in this case, I cannot share in the doubts expressed in the Secretary's opinion as to the degree of Schmidt's disability entitling him to a classification of his pension in the first class with the loss merely of both hands, or the loss merely of both feet. On the contrary, the disability resulting from the loss of the right arm and right

leg as stated, (the trifling gunshot wound of the left shoulder cuts no figure in the case,) in my judgment, abundantly justifies the adjudication made in his behalf. It is difficult to conceive of a more overwhelming disability than results from the loss, from the same side of the person, of both an arm and leg so near the body. Considered as a let or hindrance to locomotion, it is fully as great a disability as results from the loss of both feet. Considered with reference to the resulting inability to earn a livelihood, it dwarfs the disability of the loss of both feet; and considered with reference to the requirement of the regular aid and attendance of another person, the loss of both feet is scarcely comparable with it.

Schmidt has the same base for locomotion a bicycle has, but less of equilibrium. He wears an artificial leg without a foot, not because he *can*, but because he is *obliged* to. It is manifest that he can neither dress nor undress himself without assistance. He cannot wash his remaining hand, nor button the sleeve to his garments around the remaining wrist. He cannot tie a knot, nor pare an apple, nor peel a potato, nor prepare his food for mastication. In all these particulars he requires aid and attendance, while a person who has lost both feet needs none.

Again there is no trade at which he can earn his living. He cannot be a cigar-maker, nor a shoemaker, nor a tailor, nor indeed, can he be a teacher of instrumental music. One hand is the help-meet to the other, and the loss of either, necessarily reduces the person thus disabled to such a condition of helplessness as to require regularly, day by day, the assistance of others. Couple with it the loss of a leg at the hip, and you have a degree of disability that fully answers all the requirements of these provisions, to enable a claimant to the highest grade of pension provided by the general Pension Laws.

What has been said applies with equal force to the cases of the relator and his said comrades.

But this is not all there is to the Henry Schmidt case.

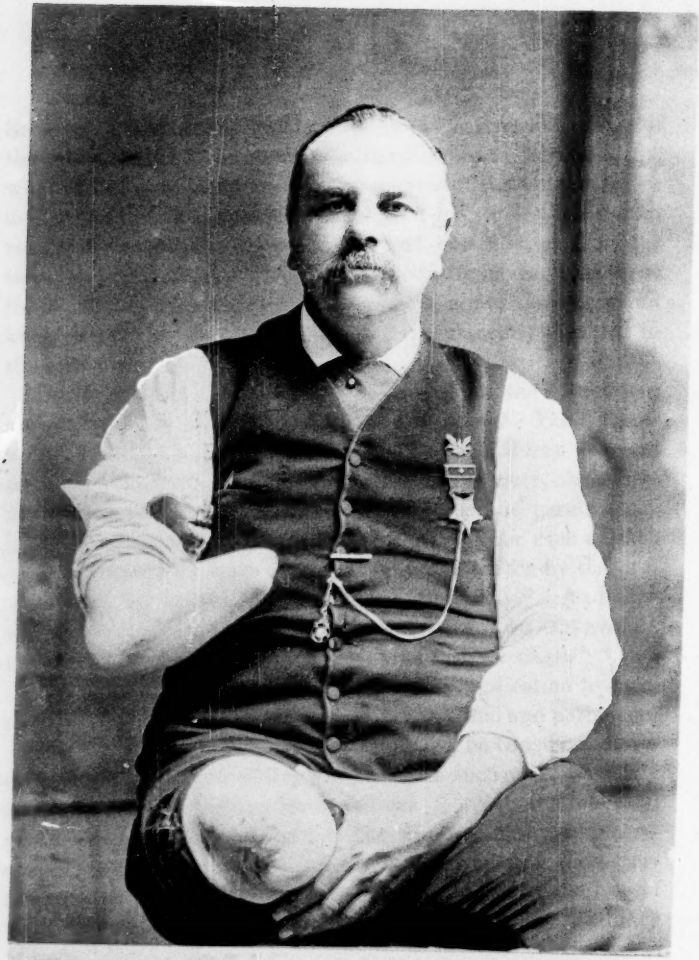
Congress has ratified and confirmed the above opinion of

Secretary Chandler, and adopted it as the correct exposition of the then existing Pension Laws with reference to those persons, who, while in the military or naval service of the United States and in the line of duty, have sustained a greater disability than results from the loss of one hand and one foot, or from the total and permanent disability of both, by having lost these limbs, one or both, near the body, that is, above the elbow and knee, or by having been totally and permanently disabled in the same, equivalent to such loss.

This ratification and adoption are found in the subsequent act of February 28, 1877, (Pension Ll., p. 38). The act provides: "That all persons, who, while in the military or naval service of the United States, and in the line of duty, shall have lost one hand and one foot, or been totally and permanently disabled in both, shall be entitled to a pension for each of such disabilities, and at such a rate as is provided for by the provisions of the existing laws for each disability." And then comes the proviso, "PROVIDED THAT THIS ACT SHALL NOT BE SO CONSTRUED AS TO REDUCE PENSIONS IN ANY CASE."

The act, by its terms, is restricted in its application to cases of the loss of "one hand and one foot," or the total and permanent disability of both. It could not, therefore, be construed to reduce the rate of pension in any case, unless such case necessarily involved the "loss of one hand and one foot," or the total and permanent disability of both. The proviso, forbidding a reduction of pension under the act, can apply only to those persons whose greater disabilities necessarily involve the loss of "one hand and one foot," or the total and permanent disability of both.

Is it not reasonable to assume that Congress, the Committee on Invalid Pensions of the House of Representatives, and the Committee on Pensions of the Senate, knew of this decision by the Secretary of the Interior in the case of Henry Schmidt? Is it not fair to assume that this proviso, in the act, was for no other purpose than to forbid a reduction of the rate of pension in the case of Henry Schmidt, and in all cases like his? Is it

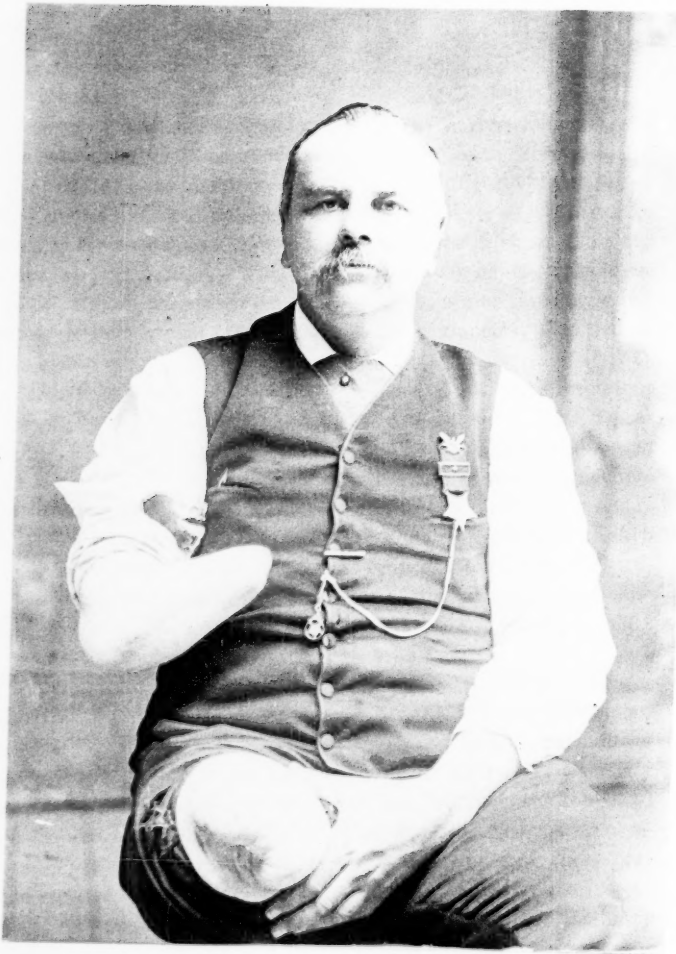


John S. Fay.
Co. F. 13, Mass. Vols.
Certificate No. 23,111

unreasonable to assume that the Legislature supposed that the ruling and decision of the Department in Henry Schmidt's case would be followed in all like cases? And, finally, is it unreasonable to hold that this proviso was introduced in the act for the sole purpose of ratifying and confirming the construction therein given to the then existing laws, with reference to their application to the case of Henry Schmidt, and all cases like his?

These questions are all answered by the opinion of this Court in the case of The United States *vs.* Joseph F. Mayes, Administrator of Sarah Alexander, 12 Wall, 177. The question involved was whether the appellee's intestate was entitled to a pension, as the widow of a Revolutionary soldier, commencing March 3, 1848, or from February 3, 1853, the date of the act under which she was pensioned. She was allowed a pension from the date of the act, and the suit was to recover the arrears from March 3, 1848. The act of July 29, 1848, provided a pension in certain cases to commence March 3, 1848, but excluded widows of Revolutionary soldiers who were married after January 1, 1800. The act of February 3, 1853, grants a pension to widows married after that date, and provides that they "shall be entitled to a pension in the same manner as those who were married before that date," that is, as the widows were pensioned under the act of July 29, 1848. The Court of Claims gave judgment for the plaintiff and the government appealed (4 Ct. of Cl., 218).

Mr. Justice Strong, after stating the question presented for decision, and admitting "the argument is not without weight," in support of the construction given the act of February 3, 1853, by the Court of Claims, delivering the opinion of the Court, says: "But, without pursuing this line of remark further, whatever might be our opinions respecting the construction of the statute, were the matter *res nova*, we cannot regard the question an open one. Immediately after the passage of the act, it was construed by the Commissioner of Pensions as granting pensions commencing only from and after its pas-



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sage, and such construction has ever since been given to it by that Bureau. That such was its meaning seems also to have been the understanding of the next succeeding Congress after it was enacted. The act of 1848, gave pensions to widows of soldiers and mariners where they had been married before the first day of January, 1800. The act of 1853, gave pensions to widows of soldiers, but not to widows of mariners. This was followed by an act passed February 28, 1855, giving pensions to widows of mariners and marines who served in the Navy during the Revolutionary War, 'in the same manner, and to the same extent,' as the widows of soldiers of the army, 'under the 2d section of the act of February 3, 1853.' Here not only the manner, but the extent of the pension was directed, and widows of mariners were put upon the same footing with widows of soldiers married after January, 1800. Had it been understood that soldiers' widows, married after January, 1800, were entitled to pensions commencing March 3, 1848, it would have been unnecessary to declare that mariners' widows should have pensions 'to the same extent' as under the act of 1853. But measuring the extent by the grant made in 1853, and not by that of 1848, tends to show that Congress regarded the extent, or commencement of the pension under the act of 1853, as different from that of those granted by the act of 1848. And this is made quite certain by the history of the legislation. The act of 1855, when first proposed, contained the following provision: 'And the pensions granted by this act, and those under the said section of the act of February 3, 1853, shall commence on the 4th day of March, 1848.' This provision was intended to change the construction which the Commissioner of Pensions had given the act of 1853 (30 Cong. Globe, 92), but it was striken out, and the statute was enacted as it now stands. The intention of Congress was thus clearly manifested to adopt the construction of the act of 1853, which had been given to it by the Pension Bureau, and we are not at liberty now to interpret it differently." pp. 180, 181.

And so I contend that the construction thus placed upon the then existing Pension Laws, by this decision of Secretary Chandler, was adopted by Congress in the proviso to the act of February 28, 1877, as the correct exposition of those laws as applicable to cases like that of Henry Schmidt.

By it, Congress intended to, and did, forbid the reduction of Schmidt's pension from $50 per month from June 4, 1874, under the said act of June 18, 1874, to $36 per month under the act in question.

By it, Congress intended not only that Philip Kreig, Certificate No. 44,947, "loss of left arm and left thigh," John J. Winn, (navy) now deceased, widow's Certificate No. 3,465, "loss of left arm and left thigh," and Philip A. B. Kennedy, Certificate No. 78,031, "loss of right arm and right leg," should have a like adjudication and a like rate of pension with Henry Schmidt for their respective like disabilities, which they severally have, but also that the relator, Frank Rose, Certificate No. 39,330, for "loss of left arm at the shoulder and right leg at the hip," that Hiram Smith, Jr., Certificate No. 54,066, for "loss of left arm near the shoulder and left leg," that Philo Bierce, Certificate No. 41,643, for "loss of left arm near the shoulder, left leg and shell wound calf of right leg," that Cordenio Bruce, Certificate No. 65,589, for "loss of left leg at the hip joint and left hand," that John S. Fay, Certificate No. 23,111, for "loss of right arm and right thigh," that George W. Clark, Certificate No. 48,246, for "loss of right arm and right thigh," that Charles Lamb, Certificate No. 159,987, for "total loss use of right arm and right leg," that Howard J. Webber, Certificate No. 104,509, for "total paralysis of left arm, side and leg," that Captain Henry A. Kircher, Certificate No. 36,243, for "loss of right arm near the shoulder and left leg above the knee," that Charles Lovely, Certificate No. 44,810, for "loss of left arm near the shoulder and right leg," that Lewis Martin, Certificate No. 61,049, for "loss of right arm near the shoulder and left leg," that Henry Funking, Certificate No. 60,472, for "loss of right arm at the shoulder and left

leg," that Patrick Melvin (navy), for "compound fracture right arm and right thigh, arm amputated below the elbow," and that Henry E. Bedell, Certificate No. 68,616, for "loss of left leg at the hip joint and total loss use of right hand," should severally have a like adjudication, and be allowed a like rate of pension for their said several disabilities, with Henry Schmidt, Philip Kreig, John J. Winn (now deceased), and Philip A. B. Kennedy.

(NOTE.—In the petition, Henry E. Bedell is inadvertently classed as for "loss of left foot and total loss use of right hand," whereas, his left leg is amputated at the hip joint.)

I not only say that this was the object, purpose, scope, intent and meaning of the proviso of the act of February 28, 1877, but assert that it cannot possibly have any other or different effect, purpose, intent or meaning, and that it is absolutely conclusive of the right of the relator and his said comrades severally, whose respective disabilities are, and ever since they were incurred, have been permanent, to a rating in the first class at $25 per month from June 6, 1866, $31.25 from June 4, 1872, $50 from June 4, 1874, and $72 from June 17, 1878, under the said provisions of Sections 4,697 and 4,698, Revised Statutes of the United States, the act of June 18, 1874, and the acts of June 17, 1878 and June 16, 1880, (Pension Ll. pp. 6, 7, 35, 36, 42 and 47). The Court will observe that the same degree of "permanent" disability that entitles a claimant to any one of the above specified rates, entitles him to them severally and successively, provided he had a claim pending at the time of the passage of the Arrears of Pension Act and the Amendatory Act of March 3, 1879, or had filed his claim with the Commissioner of Pensions, prior to July 1, 1880. (Pension Ll. pp. 43, 44, 45.)

But this is not all there is to the act of February 28, 1877. The history of legislation culminating in the act as it now stands, throws a flood of light upon the subject of the intent and purpose of the act.

Just one month before the Secretary rendered the decision hereinbefore set out, in the Henry Schmidt case, Senator Cockrell introduced in the Senate the following bill:

44TH CONGRESS,
1ST SESSION.

S. 234.

IN THE SENATE OF THE UNITED STATES.

JANUARY 11, 1876.

MR. COCKRELL asked and, by unanimous consent, obtained leave to bring in the following bill; which was read twice, referred to the Committee on Pensions, and ordered to be printed.

A BILL

To amend section forty-six hundred and ninety-eight of the Revised Statutes of the United States so as to allow a pension of thirty-seven dollars per month to soldiers who have lost both an arm and a leg, in lieu of twenty-four dollars per month now allowed.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section forty-six hundred and ninety-eight of the Revised Statutes of the United States be so amended that all persons who, while in the military or naval service of the United States and in the line of duty, shall have lost one hand and one foot, or been totally and permanently disabled in the same, shall be entitled to a pension of thirty-seven dollars per month.

SEC. 2. That this act shall take effect from and after the fourth day of March, eighteen hundred and seventy-six.

April 20, 1876, Senator Booth, from the Committee on Pensions, reported the bill with an amendment (Senate Journal, First Session, 44th Congress, p. 446).

August 4, 1876, the Senate proceeded to consider the bill. The reported amendment was concurred in. And it was "Resolved, That it pass, and that the title be amended to read, "'An act to allow a pension of thirty-seven dollars per month "to soldiers who have lost both an arm and leg.'"

The body of the act, after the enacting clause, was changed to read, "That every person entitled to a pension under the "provisions of Section forty-six hundred and ninety-eight of "the Revised Statutes of the United States, and who has lost "one hand and one foot, shall be entitled to a pension of thirty-"seven dollars per month.

"SECT. 2. That this act shall take effect from and after the "first day of September, eighteen hundred and seventy-six." (Senate Journal, First Session, 44th Congress, p. 794.) It was then referred to the House of Representatives for its concurrence, and on January 4, 1877, it was referred to the Committee on Invalid Pensions (House Journal, Second Session, 44th Congress, p. 157).

On January 9, 1877, Mr. Rusk from that Committee reported the same back to the House with an amendment in the nature of a substitute, namely:

To strike out all after the enacting clause, and insert, "That "all persons who, while in the military or naval service of the "United States, and in the line of duty, shall have lost one "hand and one foot, or been totally and permanently disabled "in both, shall be entitled to a pension for each of such disa-"bilities, and at such a rate as is provided for by the provis-"ions of the existing laws for each disability. Provided, "That this act shall not be so construed as to reduce pensions "in any case." This amendment was concurred in, and the Senate Bill as thus amended was passed. The title was not amended so as to conform to the substituted House Bill (House Journal, Second Session, 44th Congress, p. 198). The bill was

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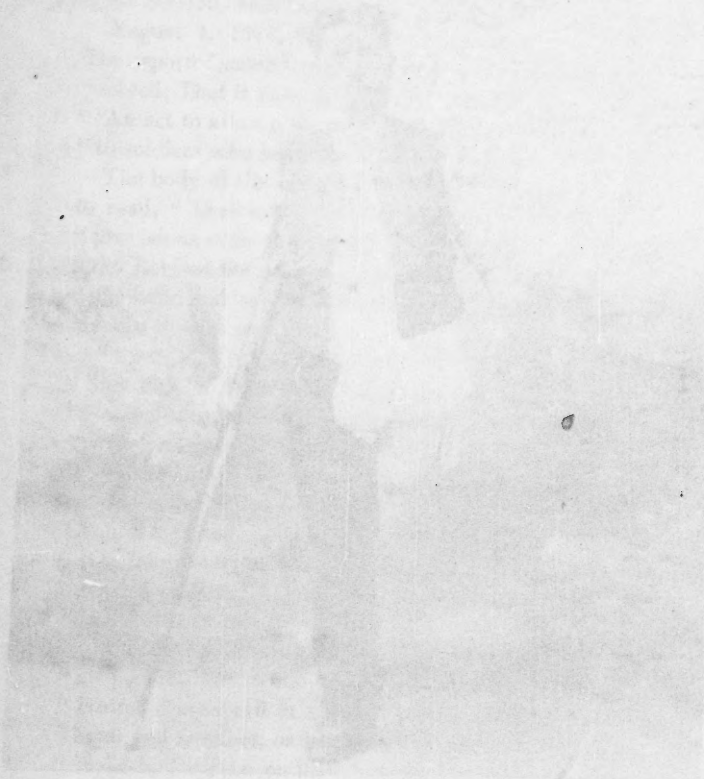


then sent to the Senate for its concurrence in the House amendment in the nature of a substitute, and on January 12, 1877, the following proceedings were had:

44TH CONGRESS,
2D SESSION.

S. 234.

IN THE SENATE OF THE UNITED STATES.

JANUARY 12, 1877.

Referred to the Committee on Pensions and ordered to be printed with the amendment of the House of Representatives, viz: Strike out all after the enacting clause and insert the part printed in *italics*.

A BILL

To allow a pension of thirty-seven dollars per month to soldiers who have lost both an arm and a leg.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ~~That every person entitled to a pension under the provisions of section forty-six hundred and ninety-eight of the Revised Statutes of the United States, and who has lost one hand and one foot, shall be entitled to a pension of thirty-seven dollars per month.~~

~~SEC. 2. That this act shall take effect from and after the first day of September, eighteen hundred and seventy-six.~~

That all persons who, while in the military or naval service of the United States, and in the line of duty, shall have lost one hand and one foot, or been totally and permanently disabled in both, shall be entitled to a pension for each of such

disabilities, and at such a rate as is provided for by the provisions of the existing laws for each disability: Provided, That this act shall not be so construed as to reduce pensions in any case.

February 14, 1877, the Senate agreed to the House amendment (Senate journal, 2d session, 44th Congress, p. 241) and on February 22, 1877, the same was presented to the President for his approval.

On February 27, 1877, the President returned the bill to the Senate with the following message:

"EXECUTIVE MANSION, *February* 26, 1877.

"*To the Senate of the United States.*

"I have the honor to return herewith Senate Bill No. 234, "entitled 'An act to allow a pension of $37 per month to sol- "diers who have lost both an arm and leg.' Under existing "law soldiers who have lost both an arm and a leg are entitled "to draw a monthly pension of $18. The object of the bill is "to allow them $18 per month for each of these disabilities, or "$36 in all. It is returned simply for an amendment of the "title, which usually agrees with the provisions. When this "shall have been done I will very gladly give it my approval.

"U. S. GRANT."

(NOTE.—The President was mistaken in saying, "Under existing law soldiers who have lost both an arm and a leg are entitled to draw a monthly pension of $18." What he undoubtedly meant to say was that the loss of *one* hand or *one* foot entitled a claimant to $18 per month.)

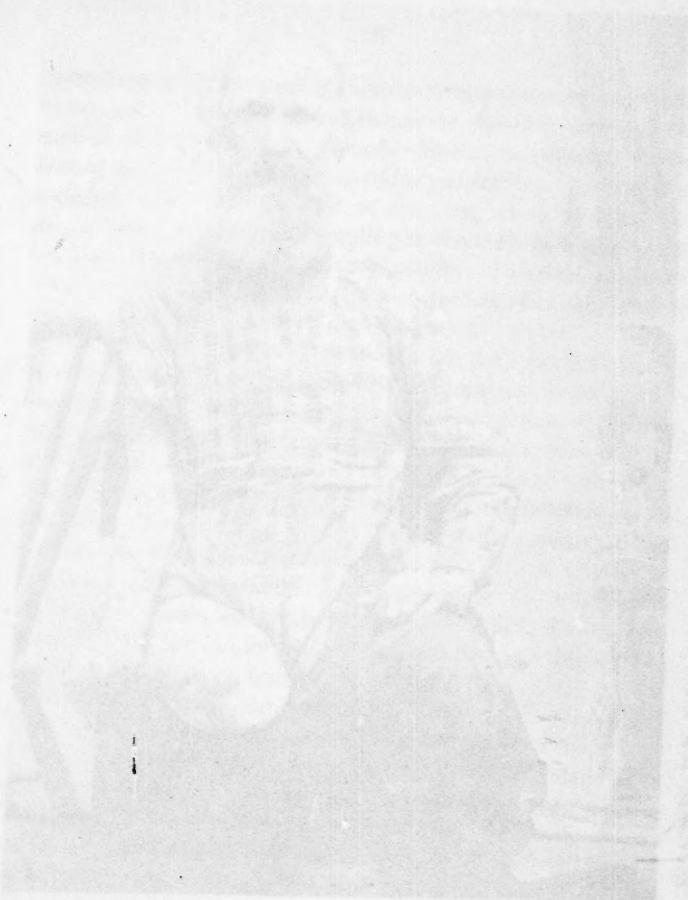
And thereupon, "On motion of Mr. Ingalls, and by unani- "mous consent, it was ordered that the word 'thirty-seven' in "the title of the enrolled bill be stricken out and the word "'thirty-six' inserted in lieu thereof; and, with the title so "amended, the bill to be returned to the President." (Senate journal, second session, 44th Congress, p. 339.)

With the title so amended by the Senate (the concurrence of the House being waived or deemed of no consequence), the President approved the act the following day. But the title as thus amended is not at all in harmony with the body of the act. The House amendment, which was in the nature of a substitute for the Senate Bill, and of altogether a different character, and making altogether a different provision for those persons who had lost one hand and one foot, or who had been totally and permanently disabled in both, was concurred in by the Senate. The title, however, was suffered to stand without corresponding amendment. It was an appropriate title to the bill as it originally passed the Senate; but it received absolutely no consideration as a title to the substitute by either the House or the Senate. A corresponding substitute for the title would have been "AN ACT TO ALLOW A PENSION FOR EACH DISABILITY TO SOLDIERS AND SAILORS WHO HAVE LOST BOTH A HAND AND FOOT." This is what the act in plain terms provides for.

The bill was introduced in the Senate before the Departmental ruling cited in Henry Schmidt's case. But before the Committee on Invalid Pensions reported the substitute to the House, the Secretary had rendered his decision and Schmidt was already rated at $50 per month under the provisions of the act of June 18, 1874. He had been re-rated and advanced to the first class for "loss of right arm and right thigh," under the interpretation therein put upon the then existing pension laws.

Now, is it not a fair argument for me to urge that the House Committee on Invalid Pensions knew of this ruling by the Secretary at the time the substitute for the Senate Bill was reported to the House? Is it not fair argument for me to maintain that the committee not only knew of this decision, but that the purpose of the substitute, and especially of the proviso, forbidding a construction of the act that would reduce pensions in any case, was to adopt, ratify and confirm the construction thereby given to the then existing laws, with reference to those persons who had sustained a greater disability than results from the

"loss of one hand and one foot," as mentioned in the body of the act, by having lost these limbs, one or both, near the body? Can the proviso possibly have any other meaning? Can it possibly have a different purpose? The act provides exclusively for those persons who "shall have lost one hand and one foot, or been totally and permanently disabled in both." Unless a case *involve*, *merge* or *include* the two disabilities therein specified, it cannot possibly be affected by the act. And yet the proviso forbids the reduction of the rate of pension in any case under the act. In what case could there be a reduction which this proviso forbids? Why in the case of Henry Schmidt "loss of right arm and right thigh," in the cases of the relator, "loss of left arm at the shoulder and right leg at the hip;" of Hiram Smith, jr., "loss of left arm near the shoulder and left leg;" of Philo Bierce, "loss of left arm near the shoulder, left leg and shell wound calf of right leg;" of Cordenio Bruce, "loss of left leg at the hip joint and left hand;" of John S. Fay, "loss of right arm and right thigh;" of George W. Clarke, "loss of right arm and right thigh;" of Charles Lamb, "total loss use of right arm and right leg;" of Howard J. Webber, "total paralysis of the left arm, side and leg;" of Captain Henry A. Kircher, "loss of right arm near the shoulder and left leg above the knee;" of Charles Lovely, "loss of left arm near the shoulder and right leg;" of Lewis Martin, "loss of right arm near the shoulder and left leg;" of Henry Funking, "loss of right arm at the shoulder and left leg;" of Patrick Melvin, "compound fracture of right arm and right thigh—arm amputed below the elbow," and of Henry E. Dedell, "loss of left leg at the hip joint and total loss use of right hand;" and also in the cases of those rated in the first class for precisely the same disability, viz: Philip Kreig, "loss of left arm and left thigh;" John J. Winn (deceased), "loss of left arm and left thigh;" and Philip A. B. Kennedy, "loss of right arm and right leg." It is difficult to distinguish any difference in the degree of disability or helplessness in these several cases. But it is otherwise in the rate of pension allowed them severally.



Left thigh wounded at the battle of Resaca

Cordenio Bruce,
Co. "K" 95 Ill. Vols.
Certificate No. 65589.

Since June 6, 1866, more than $5,000 has severally been paid to Schmidt, Krieg, Winn and Kennedy than has been paid to each of the other persons named. Bierce, in addition to the loss of the left arm near the shoulder and left leg, received also a severe shell wound of calf of right leg, which, if it existed alone, would entitle him, according to the medical testimony in the case, to a pension of $16 per month. This is a much severer wound than Schmidt received in left shoulder, that is mentioned in the Secretary's decision.

The simple statement of the fact is all the comment that is needful upon this gross inequality and injustice in the administration of the same laws and the same provisions of the law with reference to equally meritorious claimants, who are not only equally, but in precisely the same manner disabled. Frank Rose, the petitioner, for the "loss of the left arm at the shoulder and right leg at the hip," is allowed a pension of $36 per month, when, for either of these disabilities, the act of August 4, 1886 (Pension Ll., p. 68), provides the specific rate of $45 per month, and while, for instance, Philip Kreig is allowed $72 per month for "loss of left arm and left thigh." In the face of these facts, comment is uncalled for.

But I do not maintain that Congress, by the proviso of the act of February 28, 1877, adopted a construction of these laws and their provisions, placed thereon by Secretary Chandler in the Henry Schmidt case, that is absolutely conclusive of the right of each of the persons named to a rating in the first class, at $25 per month from June 6, 1866; $31.25 from June 4, 1872; $50 from June 4, 1872, and $72 per month from June 17, 1878, under the provisions cited of sections 4697 and 4698 and the acts of June 18, 1874, June 17, 1878, and by the operation of the act of June 16, 1880 (Pension Ll. pp. 6, 7, 35, 36, 42 and 47), and that the refusal by the Bureau of Pensions and the Department of the Interior to grant such classification and rating of their pensions respectively, is a denial to each of those not so pensioned, of a plain legal right under the laws of Congress. And the prayer of the petitioner, founded upon the

Left thigh bone removed at the hip joint

Corporal Bruce
Co. K 95 Ill. Vols.
Certificate No. 65552

Since June 6, 1866, more than $5,000 has severally been paid to Schmidt, Krieg, Winn and Kennedy than has been paid to each of the other persons named. Bierce, in addition to the loss of the left arm near the shoulder and left leg, received also a severe shell wound of calf of right leg, which, if it existed alone, would entitle him, according to the medical testimony in the case, to a pension of $16 per month. This is a much severer wound than Schmidt received in left shoulder, that is mentioned in the Secretary's decision.

The simple statement of the fact is all the comment that is needful upon this gross inequality and injustice in the administration of the same laws and the same provisions of the law with reference to equally meritorious claimants, who are not only equally, but in precisely the same manner disabled. Frank Rose, the petitioner, for the "loss of the left arm at the shoulder and right leg at the hip," is allowed a pension of $36 per month, when, for either of these disabilities, the act of August 4, 1886 (Pension Ll., p. 68), provides the specific rate of $45 per month, and while, for instance, Philip Kreig is allowed $72 per month for "loss of left arm and left thigh." In the face of these facts, comment is uncalled for.

But I do not maintain that Congress, by the proviso of the act of February 28, 1877, adopted a construction of these laws and their provisions, placed thereon by Secretary Chandler in the Henry Schmidt case, that is absolutely conclusive of the right of each of the persons named to a rating in the first class, at $25 per month from June 6, 1866; $31.25 from June 4, 1872; $50 from June 4, 1872, and $72 per month from June 17, 1878, under the provisions cited of sections 4697 and 4698 and the acts of June 18, 1874, June 17, 1878, and by the operation of the act of June 16, 1880 (Pension Ll. pp. 6, 7, 35, 36, 42 and 47), and that the refusal by the Bureau of Pensions and the Department of the Interior to grant such classification and rating of their pensions respectively, is a denial to each of those not so pensioned, of a plain legal right under the laws of Congress. And the prayer of the petitioner, founded upon the

allegations contained in paragraphs 11 to 25 of the petition, that this Court will so pronounce its judgment, calls for an extra-judicial opinion in the sense *only* that a mandamus will not lie to compel the respondent to so reissue their respective Pension Certificates. To this extent the opinion prayed for may be considered extra-judicial. It is extra-judicial solely because it is outside of the narrow confines of the mandamus prayed for and not because it is out of the clear legal rights of the relator and his said comrades, in whose behalf, as well as his own, he petitions, under the laws.

The relator has been adjudged to have lost "one hand and one foot," while in the military service, and line of duty, as necessarily involved in the loss of his arm at the shoulder and leg at the hip, and is pensioned accordingly. He has his certificate therefor, and in the language of the Court of Claims, this certificate "is *prima facie* evidence of his title to the pension, and of all the facts that make his title," (4 Ct. Cl., 219). It is the evidence that all duties involving the exercise of judgment and discretion have been performed. And the duty that shall thereafter devolve on the Commissioner of Pensions, by reason of subsequent legislation increasing the rate of pension for the particular disability for which he is already pensioned, will be of a purely ministerial character, and which the statutes require him to perform, rather in his individual, than in his official character. The act of March 3, 1883, increased the loss of his hand from $18 to $24, and a like increase for the loss of his foot from $18 to $24 per month, (Pension Ll. 56, 57), and the language of the law is that he "shall receive a pension of $24 per month" for the loss of a hand or foot. In like manner the act of August 4, 1886, (Pension Ll. 68) further increased his pension for the loss of his hand to $30, and granted a like increase to $30 per month for the loss of his foot.

The act of February 28, 1877, and these two acts together provide the rate of pension that a person shall receive for the double loss of a hand and foot from March 3, 1883. After a

claimant has been adjudged to have sustained this double disability in the manner and under the circumstances stated in the law, and such adjudication is evidenced by the issuance to him of a Pension Certificate, the only remaining duty is purely of a ministerial character, and consists of re-issuing, from time to time, the certificate, with the increase of rate, as shall by law be provided. The line that marks the difference between those duties, in such cases, that involve the exercise of judgment and discretion from those that are ministerial, and which the law enjoins, is as clearly defined as is the difference between an action *Ex contracto* and an action *Ex delicto*. There is no chance for a mistake. Now in this case, the mandamus prayed for, is to compel the respondent to re-issue his certificate, as for the loss of one hand and one foot, as necessarily merged in his said greater loss, at the increased rates specifically provided therefor by law, and not for a rating in the first class for the greater loss at $25 from June 6, 1866, $31.25 from June 4, 1872, $50 from June 4, 1874, and $72 from June 17, 1878, although it is perfectly clear that he has a legal right to such rating. The mandamus prayed for, is not to compel the respondent to grant the relator a pension, nor yet to fix the rate of his pension, but to grant the rating his certificate calls for under the mandate of the law. A mandamus will not lie to compel a classification in the first class at the higher rates, for the reason that the construction and application of the laws and the provisions mentioned, to the greater degree of the petitioner's disability involve the exercise of judgment and discretion—for the very reasons given by this Court in the case of Susan Decatur *vs.* Paulding, Secretary of the Navy, 14 Pet. 497.

It is not, however, my purpose here to discuss the question whether a mandamus will lie in this case, and the next preceding case of Dunlap, and the case next following on the calendar of Miller. What I shall have to say on this question is reserved until I can hear from the Department of Justice in opposition to the allowance of the writ in these three cases. All I care now to say is, that the mandamus prayed for in each case

is to constrain the respondent to re-issue their respective certificates, with the ratings they respectively call for under the law.

My purpose herein is to present such considerations as I am able, and feel in duty bound to present, why this Court should construe the laws and their provisions as contended for, although it be by an opinion outside of the strict limits of the case as made for the writ of mandamus. With this purpose in view I proceed:

Notwithstanding the legislative history as herein given, the *title* of the act of February 28, 1877, instead of its *body* has for ten years been taken by the Bureau of Pensions and the Department of the Interior as the law, and its provisions have accordingly been administered in all cases, except the four cases of Schmidt, Kreig, Winn and Kennedy as hereinbefore stated. Excepting these four, all persons who have lost an arm and a leg or a hand and a foot have, severally been rated at $36 per month, because the *title* (amended at the instance of the President by the Senate, the House not concurring as shown) provides that rate, and not because of any thing contained in the body of the act. Repeated rulings have been made in one or another of these cases to this effect. And the respondent in his annual report to the Secretary for 1887, says:

"Some discretion should be lodged in the Commissioner in correcting discrepancies in rates of pension for loss of limbs, or Congress should be asked by direct enactment to establish a table of rates for loss of limbs. The existing laws upon this point are inharmonious and are unjust. There is no sufficient reason why, if the amputation of a leg at the hip joint entitles a claimant to $45 per month, the loss of a leg and arm should together be rated at but $36. If, again, $45 be taken as a proper pension for a leg amputated at the hip joint, then the disability for performing manual labor from the loss of the foot and the hand should not be graded at a less figure!"

These views, already shown to be entirely erroneous, and the farthest possible from stating the laws correctly, can be

accounted for on no other hypothesis than that this *worthless title*, that was framed for the Senate Bill, and not for the House substitute, that became the act, was taken for the law, instead of the body of the act. In this case, however it may be in other cases, the *title* of the act is no part of the law, for the reason that the House of Representatives did not concur in the Senate amendment, suggested by the President.

The latest Departmental ruling was in the case of Oscar Dunlap, on the question of the construction of this act, with reference to the loss of his right hand and right foot. The greater disability resulting from the head injury, not having been, at that time, passed upon, by the Commissioner of Pensions, was not considered. The following letter from the Commissioner of Pensions to Dunlap embraces the decision of the Department:

DEPARTMENT OF THE INTERIOR,

Law Division. BUREAU OF PENSIONS,

K. WASHINGTON, D. C., *September* 3*d*, 1887.

OSCAR DUNLAP, Esq.,
Grand View, Dakota Ty.

SIR: By direction of the Hon. Secretary, you are advised that his decision under date of the 30th of August last, upon your appeal from the action of this office rejecting your claim for pension (increase) under Certificate No. 66,419, as late captain Co. "I" of the 26th Ills. Regt., is as follows:

Mr Dunlap is pensioned at the rate of $36 per month under the act of February 28, 1877, on account of disability from the loss of his right hand near the wrist and the right foot at the ankle.

The pensioner contends that under the act of March 3, 1883, he should be allowed the rate of $24 per month for each disability, and under the act of August 4, 1886, the rate of $30 per month for each disability.

The act of February 28, 1877, is entitled, "An act to allow "a pension of thirty-six dollars per month to soldiers who have "lost an arm and a leg." The act provides "that all persons "who, while in the military or naval service of the United "States, and in the line of duty, shall have lost one hand and "one foot, or been totally and permanently disabled in both, "shall be entitled to a pension for each such disability, and at "such rate as is provided for by the provisions of the existing "laws for each disability."

Both the title and body of the act set forth that the pension for the two disabilities should be the sum of the pensions for each disability as provided by the law as it existed at the date of the passage of the act of February 28, 1877.

There is no law which authorizes the allowance of a higher rate for the two disabilities for which the applicant is pensioned than $36 per month.

Your decision in the case is affirmed. Very respectfully, D. L. Hawkins, Assistant Secretary.

Very respectfully,

JOHN C. BLACK,

Commissioner of Pensions.

Here is apparently an effort to harmonize the *body* of the act with its *title*. The opinion says: "Both the title and the body of the act set forth that the pension for the two disabilities should be the sum of the pensions for each disability, as provided by the law as it existed at the date of the passage of the act."

The title of the act sets forth no such thing. On the contrary, it refers to no existing law, but plainly purports "to allow a pension of $36 per month to soldiers who have lost both an arm and a leg."

Neither does the body of the act "set forth that the pension for the two disabilities should be the sum of the pensions for each disability, as provided by the law as it existed at the date of the passage of the act," but plainly and unmistakably declares

"That all persons who, while in the military or naval service of the United States, and in the line of duty, shall have lost one hand and one foot, or been totally and permanently disabled in both, shall be entitled to a pension for each of such disabilities, and at such a rate as is provided for by the provisions of the *existing* laws for each disability." There is a great difference between what the act plainly declares and what the Assistant Secretary says it "sets forth." If an examination had been made into the legislative history of Senate Bill 234, 44th Congress, first session, this decision would probably have never been made. There is no chance for mistake here. The Senate Bill plainly provided for an increase for the loss of "one hand and one foot" from $24 to $37 per month. It did not adopt any new plan nor provide any new scheme for pensioning this double disability. On the contrary, it was in exact harmony with the previous provisions of the law granting for the same disability a pension of $20 per month from March 3, 1865, (Sect. 4697) and $24 per month from June 4, 1872, (Sect. 4698). Now, if the House did not intend to provide a different plan or scheme, and if it had been its purpose to continue the old plan, it is perfectly obvious that a mere amendment to the Senate Bill, by striking out the word "thirty-seven" and in lieu inserting the word "thirty-six," would have been made, instead of striking out the whole body of the Senate Bill, after the enacting clause, and substituting the House Bill, which was afterwards concurred in by the Senate and is now the law. The clear intent of Congress was, as manifested in the legislative history of this bill, to make a permanent provision for the loss of one hand and one foot by making the rate of pension therefor dependent upon the rates provided for the respective disabilities by the provisions of "existing law." The intention was that this act should be a coexisting law with such provisions. A law that has been repealed or superseded is no longer an "existing law." And if Congress should absolutely repeal the present existing law (act of August 4, 1886, Pension Ll., p. 68), providing a pension of $30 per month for the loss of a hand or

foot, all pensions for the loss of both a hand and a foot would be thereby withdrawn, for there would then be no "existing law," for the act of February 28, 1877, to be construed with, to ascertain the rate for the loss of the hand or for the loss of the foot.

There can be no doubt that this radical change, wrought in the law by the House substitute, with respect to the loss of both a hand and foot, was prompted by the Secretary's decision in the Schmidt case, referred to. The purpose was to adopt that ruling as the correct exposition of the law, as to such cases as his, and this purpose is clearly evinced by the proviso, and at the same time to make the provision, as before stated, for the lesser disability of the loss of one hand and one foot.

It follows from this that all persons who have the greater disability of the loss of an arm and a leg, and who have been rated as for the lesser disability of the loss of a hand and a foot, under this act, have been erroneously rated, and have been denied their just rights under the law, as construed by Secretary Chandler and adopted by Congress. It does not, however, lie in the mouth of the respondent to say, upon the adjudication that is made and evidenced by the relator's certificate, that he is not entitled, as for the loss of a hand and foot, to the specific rate of pension provided by law for this lesser disability.

Nor can the act of February 28, 1877, be construed so as to grant to a person who has lost both an arm and a leg "a pension for each of such disabilities, and at such a rate as is pro-"vided for by the provisions of the existing laws for each dis-"ability." The loss of a hand is in fact a less disability than the loss of an arm at or above the elbow; and the loss of a foot is a less disability than results from the loss of a leg at or above the knee. The law then recognized this *fact*, by having provided a higher rate of pension for the greater than for the less disability. The act, by its terms, is limited to the loss of "one hand and one foot," and such loss cannot be made to include the greater loss of an arm and a leg, by any meaning the words

employed are capable of. The greater includes the less, the less not the greater.

But it is due to Assistant Secretary Hawkins to say, that since these cases have been pending in this Court, another and different ruling has been drawn up in the case of Charles Lovely, one of the persons herein mentioned in which it is considered that the loss of "one hand and one foot," or the total and permanent disability of both, entitles a claimant to the rating contended for, namely, $48 from March 3, 1883, and $60 per month from August 4, 1886. But this decision has not as yet been carried into effect. It is held in abeyance to abide the judgment of the Court in these cases, and, more particularly, its judgment on the questions I have herein discussed, and which are of vital interest to these utterly maimed and crippled soldiers, and upon which, I am assured, the Department is equally desirous, with myself, that the Court sholud pronounce its judgment.

And why should your Honors pronounce judgment in the premises? Why, to bring order out of confusion; to secure equality, justice and impartiality in the administration of these laws, to persons equally meritorious, equally disabled and from precisely the same cause or causes; to lay down a uniform rule for the guidance of the Department and the Bureau of Pensions, for their construction and interpretation, so that "fish shall not be made of one and flesh of another" in the administration of them; and because the relator and his said comrades have a clear legal right to the same classification of their pension that has been accorded Henry Schmidt, and are denied this right by the respondent. Because Congress has adopted the construction put upon these laws by Secretary Chandler in the Schmidt case, which, by its terms plainly covers the case of the relator and his comrades mentioned. Because, before a like adjudication could be made in behalf of all the others in like manner with Schmidt disabled, the Secretary surrendered office to his successor. Because the then Commissioner of Pensions was succeeded in office by another person. Because these suc-

ceeding incumbents in office refused to follow the rulings in the case of Schmidt, as a precedent in the other cases. Because they neglected or omitted to look into the legislative history of this Senate Bill 234, which fructified in the act of February 28, 1877, through the substitute of the House of Representatives, Congress thereby adopting and ratifying the construction thereby put on these laws. Because Congress, by the said act and the proviso thereof, did adopt, ratify and confirm such interpretation as the correct exposition of these laws and these provisions. Because such adoption and ratification by Congress, is conclusive of the right of the petitioner and his said comrades to a like rating of this pension in the first class. Because the petitioner and his comrades are without any other remedy, being barred from the Court of Claims by the "Bowman Act." Because a mandamus will not lie to compel such classification, the exercise of judgment and discretion being required in the premises. Because the respondent, following in the foot-steps of his immediate predecessor, refuses their prayer. Because their respective disabilities being of a permanent character, there is no change in the degree thereof, and no additional evidence can be furnished, and their appeal for justice is met with the plea of "*res judicata*." Because of the utterly absurd conclusions these erroneous rulings have led to, namely, that the loss of both an arm and a leg so near the body as to prevent the use of artificials limbs, entitles a claimant to $9 less pension per month, than the loss of either without the other. Because these laws, when properly construed and rightfully administered, afford equal and exact justice to all persons, by providing equal pensions for equal disabilities.

These are some of the reasons why your Honors should pronounce judgment on the questions I have discussed. They appertain to the rights of the petitioner and his comrades. There are other reasons, and, in my judgment, stronger reasons why this Court should pronounce its judgment in the premises; and they appertain to the Court itself. They are, that this Tribunal is one of the three great co-ordinate branches of the govern-

ment, created by the people, and not by Congress. The same Constitution that creates the Executive and Legislative branches of the Government, creates also this Court. Here resides the sovereignty of the people, as to the power and authority of interpreting and expounding the Constitution and the laws of Congress, and when that power and authority are exercised in behalf of a citizen of the United States having legal rights under those laws, the judgment of this Court is conclusive of those rights, and it is of no consequence that such judgmeat be pronounced in matters that are outside of the restricted limits of the writ of mandamus. It is enough if they have a necessary legal connection. The modern rule, and correct rule, that limits the judgment to those matters and things that are necessarily involved in the adjudication, can have no application here. If the provisions of the law, that are cited, entitle the relator to a rating of his pension in the first-class—if Secretary Chandler correctly construed those provisions in the Henry Schmidt case—and, especially, if Congress adopted his construction, as I contend it did, by the act of February 28, 1877, and the proviso thereto, then why should not this Court say so? Justice demands it. The legal rights of these maimed soldiers call for it. Such judgment will not create confusion in the administration of the Pension Law, but will bring order out of confusion. There is not a reason given in any case for refusing an extra judicial opinion, that does not contain, in itself, the very reason why such opinion should be delivered in this particular case.

In the case of Decatur *vs.* Paulding (14 Pet., 497), which was a sort of a bill in equity praying for mandamus to compel the respondent, as Secretary of the Navy, to pay a certain sum of money, "or such part or portion thereof as your Honors may direct," and in which the relatrix does not show herself entitled to any relief whatever, either in law or in equity, much less by the writ of mandamus, the petitioner founds her claim for the writ, not upon an adjudication in her behalf (which is an indispensible requisite in all cases for mandamus), but upon an ad-

judication expressly against her right to the pension claimed. Her contention was that the law providing a pension, in rate equal to the half pay of a post captain, should be construed to include rations and allowances, and the Court was asked to so construe it, notwithstanding a uniform construction to the contrary had always been put upon it by the Department. Upon this point the Chief Justice said: "It is understood from the "Secretary's return to the mandamus, that in allowing the half "pay, it has always been calculated by the pay proper, and that "the rations, or emoluments to which the officer was entitled, "have never been brought into the calculation. Suppose the "Court had deemed the act required by the resolution in "question a fit subject for a mandamus, and, in expounding it, "had determined that the rations and emoluments of the officer "were to be considered in calculating the half-pay. We can "readily imagine the confusion and disorder into which such a "decision would throw the whole subject of pensions and half-"pay," p. 516.

There is no "confusion and disorder" to be wrought in the case at bar by the Court construing the laws and provisions of the law in question. On the contrary, to do so, would be to bring order out of confusion.

The case of the State of Kentucky *vs.* Dennison, (24 How., 66), was a petition for a *mandamus* against the Governor of Ohio to compel the surrender of a fugitive from justice. In an elaborate extra judical opinion this Court expounded the constitutional provisions for the redition of fugitive criminals from one State to another, defined the rights of the State from which the criminal had fled, and the correlative duties of the State in which the fugitive had taken refuge. The opinion sustains the right of the State of Kentucky, but the motion for the writ is denied in these words: "But if the Governor of Ohio refuses "to discharge this duty, there is no power delegated to the gen-"eral Government, either through the Judicial Department or "any other Department to use any coercive means to compel "him. And upon this ground the motion for mandamus must "be overruled." The refusal of the Governor of Ohio to sur-

render up the fugitive in the case, was on the ground that the offense charged was not embraced in the words, "treason, felony, or other crime," used in the Constitution. This Court felt in duty bound to define the meaning of these words, and did so, and its judgment is none the less binding because the opinion was extra judicial, the Court having no jurisdiction to issue the writ.

There are many cases in which this Court has, on the one hand, delivered extra judicial opinions, while, on the other, there are many cases in which such opinion has been refused. I think this rule may be fairly deduced from all the cases; that whenever it is shown that the Government, or the individual has a legal right, and that right is incident to the very matters that are necessarily involved in the adjudication, the Court will express its opinion upon such question of right, when it shall appear that the law affords no direct remedy.

The opinion of the Court in the case of Marbury *vs.* Madison, (1 Cranch, 137) may not be thus accounted for. This is the first case for mandamus against an executive officer in this Court. The suit was brought here in the first instance, as though the Court had original jurisdiction. The petition was for mandamus to compel the Secretary of State to deliver to the petitioner his commission as Justice of the Peace in and for the County of Washington, and District of Columbia. The last thing decided in the elaborate opinion by Chief Justice Marshall, was that the Court had no original jurisdiction of the case, and the motion for the writ was overruled, and the rule was discharged on these grounds. As to all other questions decided (and they are numerous), the opinion is extra judicial—outside of the case. Upon the facts in the case the Court decided that the relator was entitled to his commission as such Justice of the Peace, and that it was the duty—ministerial duty—of the respondent to deliver the same to him, and that mandamus was the proper remedy. Among the supposed cases that are considered with reference to the remedy by mandamus, Chief Justice Marshall supposes a case that exactly

meets the exigencies of the three cases of Dunlap, the relator, and Miller under consideration, His Honor said: "By the act "concerning invalids, passed in June, 1794, Vol. 3, p. 112, the "Secretary of War is ordered to place on the pension list all "persons whose names are contained in a report previously "made by him to Congress. If he should refuse to do so, "would the wounded veterans be without remedy? Is it to be "contended that where the law in precise term, directs the per- "formance of an act, in which an individual is interested, the "law is incapable of securing obedience to its mandate? Is "it on account of the character of the person against whom the "complaint is made? Is it to be contended that the Heads of "Departments are not amenable to the laws of their country," p. 164.

I will diverge for a moment to call attention to how forcibly the language here used by the great Chief Justice applies to these cases.

Upon the very adjudication made in the Dunlop case and evidenced by his certificate, the mandate of the law is, that he "shall be entitled to $25 per month" from June 6, 1866; $31.25 from June 4, 1872; $50 from June 4, 1874, and $72 per month from 17, 1878. And so it is in the case of Miller. In the case of the relator, considered as for the loss of a hand and foot, the madate of the law is that he "shall be entitled to a pension for each of such disabilities, and at such a rate as is provided for by the provisions of the existing laws for each disability," and the "*existing laws*" provide $24 per month for each from March 3, 1883, and $30 for each from August 4, 1886.

Resuming. Considering then the great importance of the the questions presented, the legal right of the relator and his said comrades to a rating of their pensions in the first class, at the rates aforesaid, and that the law affords no direct remedy for the redress of their complaint—that, as the said laws and provisions are now construed and administered by the Pension Bureau, the most glaring inequality exists in the matter of rates of pension as to those persons equally, and in precisely the same

manner, and from the same cause or causes disabled, all to the prejudice of the relator and his said comrades; and further, considering the great confusion, the great injustice, that have arisen by reason of the contradictory rulings and decisions of the Department and Pension Bureau, under different administrations, resulting in the utterly absurd holding as to the relator and his comrades mentioned, that the said laws and provisions provide a greater pension by $9 per month for the loss of an arm or a leg alone, so near the body as to prevent the use of artificial limbs, than for both such losses combined; I respectfully submit to the Court if there ever was, or if there ever can exist, a case, that calls for an extra-judicial opinion of this Court, the case of the relator does.

In conclusion, I will call attention to the great merit of these cases—to the fact that the equity of the statutes inclines strongly to these petitioners. They are not claimants, nor petitioners, for or on account of any disability from any disease alleged to have been contracted in the service and line of duty, and which human flesh is heir to, whether in the army or out of it. Nor is it necessary to figure out the causes of their utterly helpless condition through the aid of the elastic and plastic medical doctrine of "pathological connection and sequence." On the contrary, their disabilities and the causes thereof are open to ocular proof. Unlike cases of disability resulting from disease, the causes of their helplessness are susceptible of absolute proof. Their limbs were torn from their bodies by the bursting shells, and solid shot of the enemy. Their wounds were received in battle. By reason of the certainty of the justice and merit of their claims the equity of these laws enclines with strong arms to their cause.

As a part of my argument on this point, and as an exhibit, illustrating much more forcibly than words can, the great helplessness of the condition of the relator and his comrades, I attach to my brief copies of the photographs of Frank Rose, plaintiff in error, frontispiece, Hiram Smith, Jr., p. 5, Philo

Bierce, p. 10, John S. Fay, p. 15, George W. Clarke, p. 20, and Cordenio Bruce, p. 25.

This photograph of Rose is from the original taken the day he left the hospital. On the stand, and extending along the right forearm, will be seen the perforated femur taken from the right thigh. The photographs of the others have been recently taken. These are no worse off than are the others whose photographs are not exhibited. They are all about alike disabled.

J. G. BIGELOW,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES EX REL. FRANK Rose, plaintiff in error,
vs.
JOHN C. BLACK, COMMISSIONER OF Pensions.
} No. 992.

BRIEF FOR THE DEFENDANT IN ERROR.

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No. 992.

BRIEF FOR THE DEFENDANT IN ERROR.

This is an application for a mandamus to compel the Commissioner of Pensions to increase the allowance of the relator as a pensioner.

The relator was in the military service of the United States during the late war, and served in Company D, Fifty-seventh New York Volunteer Infantry.

He received wounds in battle which resulted in the amputation of his left arm at the shoulder and right leg at the thigh.

He says he was allowed a pension as for the loss of one hand and one foot—that is to say, $20 per month—from the 3d of March, 1865, under section 4697, Revised Statutes; $24 per month from the 4th of June, 1872, under section 4698; and $36 per month from the 28th of February, 1877, under the act of that date, taken in connection with said section 4698, providing a pension for the loss of a hand or foot of $18 per month.

But relator claims that he is entitled to $25 per month from 6th June, 1866; $31.25 per month from 4th June, 1872; $50 per month from 4th June, 1874; and $72 per month from 17th June, 1878.

The Commissioner of Pensions rules one way and the relator contends that he should have ruled another way.

Without bringing the Commissioner before the court by laying a rule on him, the court below dismissed the petition.

The Commissioner was never in court while the case was in the court of first instance, nor

does this court get jurisdiction over him by virtue of the citation which is incidental to its appellate power.

The undersigned appears as *amicus curiæ*.

ARGUMENT.

It is hardly necessary to add anything to the argument contained in the brief filed in No. 991; as the two cases are identical in principle. In both the attempt is to control the Commissioner of Pensions in the executive function of interpreting the laws which Congress has made it his duty to administer, and in administering which this court has said again and again that it will not attempt to control his judgment.

The relator has not made it clear that the amount in controversy is over $5,000.

It is respectfully submitted that the judgment must be affirmed.

WM. A. MAURY,
Assistant Attorney-General.